IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 231.

CHRISTIAN SCHWARTZ ET AL.,
Plaintiffs below and Appellants,

vs.

JOHN S. DUSS ET AL.,
Defendants below and Appellees.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

APPELLANTS' BRIEF OF ARGUMENT.

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SUPREME COURT OF THE UNITED STATES.

CHRISTIAN SCHWARTZ, *et al.*, *Appellants,*
vs.
JOHN S. DUSS, *et al.*, *Appellees.*
No. 231. October Term, 1901.

APPELLANT'S BRIEF OF ARGUMENT.

HISTORY OF THE CASE.

The present proceeding was instituted for the purpose of having the remaining assets of an alleged defunct society distributed among those entitled thereto, including the present plaintiffs, and at the same time prevent the consummation of a plan which aims to divert millions of dollars to those who are not entitled to the same.

The history of the Harmony Society is unique in the annals of sociology, while the several legal questions now to be passed upon are, for the most part, novel in our jurisprudence. The State Courts of Pennsylvania have reviewed one or two questions affecting the society at a date prior to the alteration of the main article of association, and *before* the legislature had passed laws providing different methods of incorporation, or had imposed restrictions limiting periods of accumulations, so that its construction of the earlier articles of association is wholly inconclusive; the Federal Courts, so far as they have touched upon the questions now at issue, have been in entire accord with the contentions of the complainants.

The society had its inception at the beginning of the last century; its membership gradually rising to upwards of six hundred, and as the new century begins the present tribunal is called upon to determine the disposition of assets, amounting to and probably in excess of five million of dollars, which it is alleged the prearranged survivors of the society, eight in number, have recently con-

verted into a form that, if legal, makes the "joint and indivisible" property as volatile as air and its ownership as mutable as negotiable paper.

The chronological history of the society is as follows:

In the year 1803, George Rapp and his son, John, and several of their friends, left the Kingdom of Wurtemburg, came to the United States, and located at a place called Harmony, in Butler County, Pennsylvania, where they were joined by a considerable number of other emigrants. They remained there until the year 1814, when they removed to Posey County, Indiana, where they remained until the year 1825, when becoming dissatisfied, they moved back to Pennsylvania, and located at Economy, in Beaver County, Pennsylvania, where they ever since have resided.

The Harmony Society was organized upon the principle of community of goods and land ownership. The members of the said society, who had brought with them from Wurtemberg money, combined their funds and held all their property in common, they living as members of a common household, and each member enjoying alike with every other the fruits of their common labor in equality and brotherhood. The occupation or business of said society was agriculture, except in so far as it was necessary to manufacture shoes, clothing and other necessaries for the community. The members of said society obeyed said George Rapp as their spiritual and temporal leader and ruler. The only laws or rules governing said society were made by him, the members thereof having no voice in their enactment.

About the year 1807 the community promulgated the doctrine of celibacy as being necessary for the success of a communistic society. Wives were separated from their husbands, and henceforth lived apart. From that date no marriage ceremony has ever been performed in the society, and celibacy was rigidly practiced until about the year 1892, when this rule was ignored.

The Harmony Society, as it in later years is designated,, was known as "George Rapp and his associates" from the year 1805,

when the first articles, so far as is known, were executed, until the year 1836.

Who George Rapp's associates were is undisclosed by any of the records of the society. It is almost a certainty, however, that he had no "associates," for from the beginning until his death in 1847, he was the absolute and exclusive ruler, patriarch and lawgiver; and had the absolute and exclusive control of all its wealth, and of its internal and external affairs.

The scheme of society conceived by George Rapp was an association with "community of goods, as adopted in the days of the Apostles," with the government of the Patriarchal age, as cardinal principles. New members were to be admitted by "adoption." All additions to the society have been by "adoption." All the power vested in and remained in the patriarch; all subjection and no power, voice or vote constituted the portion of "adopted" members.

Every member upon adoption executed conveyance of his real estate, and surrendered possession of his personal wealth to "George Rapp and his associates" until 1836, and afterwards to the Harmony Society, for the use and benefit of the community; and every "adopted" member entered into written articles of adoption.

Until the execution of the Articles of 1836, the "adopted" members, upon withdrawal from the community, were entitled to a return of the value of their lands, money, goods and chattels, severally contributed to the society, without interest, in three annual gales; the profits of their labor were, however, unrecoverable.

The Article of 1836 was written in English and German, and was executed by 391 members of the society, *revoking and annulling* the sixth article of the agreement of March 9th, 1827, which had provided for the refunding to withdrawing members, the value, without interest, of the property or money contributed by them to the society, converting all of the property, no matter how derived and all future acquisitions of all kinds "forever" a "*joint and indivisible stock*," and confirming and continuing the remainder of that agreement. A copy of this agreement is Exhibit "D," and is printed both in the Argument and in the Record.

Up until the date of the adoption of the Article of 1836, those who had contributed money or land to the society could, as already stated, withdraw and receive back from the society the cash value of such contributions. Such a system being deemed unfair and likely to create dissensions, it was agreed by all the members, and those who joined subsequently, that no member's contribution thereafter should be restored, but that all should stand upon an equality, whether they gave money, land or simply labor, and that all property rights should thereafter be "joint and indivisible." By this radical change all members were made *equal donors* of the trust property, and the Harmony Society the donee, holding the trust properties in perpetuity. In order to effectually carry out this provision all records showing the amount of contributions were destroyed.

No terminal period was contemplated by the members, except possibly the millenium, and at the same time they prohibited any division of the trust properties during the interim, not only by express terms, but by their voluntary omission to provide for any successor to the properties by way of remainder over or joint tenancy.

If the members sacrificed their heirs by the creation of the perpetual trust in favor of the society, it is equally clear that they carefully provided against the selfishness or cupidity of succeeding members should they attempt to divide the property of the society amongst themselves. Under the theory of the appellants, if the society comes to an end from any cause whatsoever, a resulting trust ensues, and the heirs of those deceased members dying in the society since 1836, who were only to be deprived of their inheritable rights in favor of what was intended to be perpetual trust, must, on failure of such trust become distributees by way of resulting trust. The correctness of this contention we think has been practically decided by the United States Supreme Court in the case of Nachtrieb *vs.* Harmony Society and in Hopkins *vs.* Grimshaw, quoted in the Argument, pages 51 and 112, respectively.

The Article of 1836 is the only material article bearing upon

the property rights of the plaintiffs, while the Articles of 1805, 1821, 1827 and 1847 are material in considering the character of the trust, the purposes and principles of the society, etc.

These articles show that the society was governed by a single patriarch until the death of Father Rapp in 1847, when a Board of Elders, with the same autocratic dominion, possessing absolutely the powers of *self-perpetuation* and the *sole right to elect members into the society*, was introduced, thus continuing the patriarchal system as heretofore and down to the date when the present complainants allege the society was dissolved.

The society is an unincorporated association, holding lands, tenements and personalty in perpetuity; governed by an oligarchy, and founded upon a system of community of property, in which under the Article of 1836 all members were equal and joint owners thereof. This association was neither created, as or at any time in its history became, a religious, charitable, literary or scientific association.

After the society settled at Economy it built a large town; the property extends along the Ohio river for a distance of about three miles, and back a distance of perhaps a mile, comprising over three thousand acres of very rich soil and heavily timbered land. It is located about 15 miles below Pittsburgh on the eastern shore of the Ohio river, and to-day it is deemed the most valuable town site within fifty miles of Pittsburgh. It is well surrounded by villages, towns and extensive manufacturing plants. Hundreds of wooden and brick residences were built; also warehouses, granaries, barns, silk and woolen mills, saw-mills, flour mills, and numerous shops for manufacturing shoes, clothing and other necessities of life. Agriculture in its broadest sense largely occupied the members for many years; stock raising and dairy produce were also important items. Later on the profits of such joint labor were invested in valuable stocks and bonds; then the investments went into outside industrial enterprises and gradually the trustees began entering into numerous business enterprises, owned wholly by the society in Beaver County or adjoining counties, followed finally by becoming silent or active partners in numerous manufacturing concerns, railroads, cutlery works, coal companies, banks, etc., throughout Western Pennsylvania. As the membership decreased the

wealth multiplied, and so rapidly did the original members of the society die that in later years it became the custom of the society to replenish its decreasing ranks by electing new members; this was absolutely necessary, as the society, being a celibate one, its ranks could only be maintained by calling in new members. The failure of the Board of Elders to elect new members, whatever the desires of the members not on the board, meant death to the society as a communistic association.

On January 1st, 1890, the society had about the average number of members of the few preceding years. Jacob Henrici was Senior Trustee, having been elected in 1847; Jonathan Lenz was Junior Trustee, elected in 1867. Three members of the Board of Elders died in the beginning of January, 1890; among them Mr. Lenz, the Junior Trustee. These vacancies were not filled by a vote of the members of the society, or were their successors elected from the members of the society itself, but the remaining members of the Board of Elders, it is alleged, elected John S. Duss, Jacob Nicklaus and Herman Fischern, three employes of the society, who were on the pay roll up until the date of their selection. Mr. Duss' history and antecedents are referred to in the argument. The defendants alleged that these three persons were legally elected, becoming members of the Board of Elders and of the society the same day. Such a proceeding had never occured before. The Board of Elders, under the Article of 1847, had the sole right to elect members into the Society; but the applicants for admission were generally expected to serve a year's probation before formally entering the society. While it seems to be true that this self-perpetuating board could elect to vacancies in the board whom they pleased in the society, yet never before had they gone over the heads of the members to select outsiders for the board.

Three weeks later, on February 13th, sixteen new members were elected, including Susie C. Duss, the wife of J. S. Duss. About July 1st, Ernest Woelfel, a comparatively young man who had succeeded Lenz as Junior Trustee, died suddenly. Mr. Duss was elected by his colleagues to fill the vacancy. Shortly thereafter the said Duss and his wife, and two children took up their residence in the Great House. This was the first time since the introduction of celibacy, in 1807, that a trustee with a wife and children resided in the Great House and presided over the affairs of the society.

On December 25th, 1892, Father Henrici, the Senior Trustee, who had presided over the society for nearly fifty years, died at the age of 87. The next day J. S. Duss was elected Senior Trustee, and Samuel Sieber, the town constable, was elected to fill Duss' place as Junior Trustee; so that both trustees, who, by custom and under the articles of association, were the absolute rulers of the society, were men who but a short period before were mere employes of the society; and as Mr. Sieber, the new trustee, like Duss, had a wife these occurrences excited comment among the old members of the society, for it effectually destroyed the doctrine of celibacy, the very basis of the society's system of communism. The Lower Court in its opinion stated "about the year 1807, the community promulgated the doctrine of celibacy as being necessary for the success of a communistic society." Conditions were now favorable for disintegration, owing to the character and disposition of those into whose hands the society had fallen.

The uncontradicted evidence shows that from the time Mr. Duss became Senior Trustee in 1893, no new members were elected. Out of a membership of forty in 1890, some fifteen died, the shares of seventeen were purchased, and no one was elected into the society. By closing the door to admissions, which had never happened before, by the death of the old members of the society, who at this period were rapidly dying off, and by the purchase of the interests of the large number of younger members, this "community," was reduced to a few persons, all women but two, a number insufficient to fill even the Board of Elders and Trustees, and leaving no member in this communistic society to be governed. It was admitted that Mr. Duss at that time was the only one remaining capable of transacting the external and internal business affairs of the society.

On the 14th day of February, 1893, the following *members* of the Harmony Society filed a Bill in Equity in the Court of Common Pleas of Beaver County, Pa., praying for the dissolution of the Harmony Society, viz.: Benjamin Feucht, Rebecca Feucht, Henry Feucht, Margaret Feucht, Tirza Feucht, Dorothea Hoehr, Rebecca Lautenschlager, Edward Kellerman and Christina Rall, the defendants in said bill being the members composing the Board of Elders and some thirteen others. While the master frequently refers to this proceeding, he, throughout his long opinion,

which is filed with the defendants' numerous exhibits, fails to include a copy of this bill in his report, or even give a summary of all of its more important allegations, although he makes it a means of several important findings of fact.

There is given in said bill a history of the Harmony Society, from its foundation down to the year 1847; the personal history of the plaintiffs; the recital of the abandonment of certain customs, and that the principle of celibacy had ceased to exist; that the society is wholly occupied with temporal affairs, and that equality and brotherhood have been put aside and forgotten; that the Board of Elders of the society had the power of perpetuating itself and of filling vacancies among its own number without any of the other members of the society having a voice in their selection; that a majority of the members of said Board of Elders were an evil example and offense to those who still cling with affection to the primitive form and faith of said society; that John S. Duss and Samuel Sieber, in the exercise of the power and authority of their positions as trustees, declared it to be their purpose to abolish the pursuit of agriculture and the long standing customs of the society, and that it was their purpose to sell the property and the land of said society and to make the same solely a manufacturing society; that Trustee Duss had recently sold, assigned and disposed of all or substantially all of the valuable dividend-paying stocks in numerous companies and corporations, amounting to over two millions of dollars, ostensibly for the purpose of paying debts, thereby diverting the assets of said Harmony Society from the plaintiffs and other members; that said J. S. Duss had in his hands the management of all the business affairs of the society; that his said co-trustee and said elders are entirely under his control and merely act as his servants and agents.

And the prayers for equitable relief *inter alia* were as follows:

That a receiver be appointed by the Court to take charge of and manage the affairs of said society until the winding up of the same and the distribution of its property and assets, real and personal; that the Court order and direct a dissolution and marshalling of its assets, of its accounts, and a winding up of its affairs, and a division and distribution of its assets, real and personal, either by means of a sale under the order of Court, or in such other

manner as may be most expedient to and among the parties equally and equitably entitled thereto, and that the petitioners therein may receive their just share and proportion of said assets, real and personal, in severalty. On a hearing upon *ex parte* affidavits a preliminary injunction was refused, without any opinion being filed. The defendants then answered, denying complainants, averments, and later before final hearing the bill was dismissed, as will appear hereafter.

It is at this period appellants assert that arrangements were entered into *for the quick and secret dissolution of the society and a division of its wealth among the few members, without any regard to the property rights of the heirs of deceased donors.*

With Henrici and Lenz, the old trustees out of the way, with the Board of Elders composed of raw recruits from the Economy farm, with two young trustees (having wives and children) and not in sympathy with the doctrine of "communiy of goods as adopted in the days of the Apostles," it is not surprising that the temptation to seek a division of this property in the end prevailed.

While the so-called Feucht bill was pending, asking for a receiver and a distribution of the assets of the Harmony Society among those entitled thereto, Senior Trustee Duss, in conjunction with a corporation attorney, who had taken up his residence in the town of Economy, began distributing the money and real estate of the society among the members, receiving from each a quit claim and acknowledgment of full satisfaction of their interest or share in the property of the society.

While considerable evidence was taken covering this period, and the master has quoted such portions of it as would tend to sustain his finding, he carefully refrained from printing in his report a single one of these quit claims, although their materiality under the averments in the complainant's bill was self-evident. The present record contains all the so-called deeds of liquidation, under which seventeen members received in money and land something over one hundred thousand dollars. We print as a part of the history of the case one of these deeds of settlement:

EXHIBIT NO. 5.

RELEASE OR QUIT CLAIM OF SIGMUND STIEFVATER.

"I, Sigmund Stiefvater, a member of the Harmony "Society, at Economy, Beaver County, Pa., being de- "sirous of terminating said membership and withdrawing "from said society, do declare that I do hereby of my own "wish and purpose surrender and renounce forever my "membership in and connection with said society, like- "wise all my rights, interests and privileges as a mem- "ber thereof; and further, in consideration of the sum "of five thousand ($5,000) dollars in cash paid to me "out of the funds of said society by John S. Duss and "Samuel Sieber, trustees, receipt whereof is hereby ac- "knowledged, I do hereby release, cancel and discharge "any and all claims whatsoever which I, my heirs, assigns "or lawful representatives may or could ever have against "said society or its trustees, its property or assets or any "part thereof, I hereby declaring all such claims to be "fully compensated, settled, released and discharged. "And I do further declare that I have accepted said sum "of five thousand ($5,000) dollars and have surrendered, "compromised, settled, released and discharged all claims "that I or my heirs, assigns or lawful representatives have "or could have against said society, its trustees, its prop- "erty or assets or any part thereof (entirely at my own "solicitation and without any invitation, request or so- "licitation so to do, by said trustees or either of them), in "the full knowledge of the fact that said society owns in "addition to its property at Economy and Leetsdale "several thousand acres of land in Michigan, and in War- "ren County, Pa., also certain tracts of land in Allegheny "County, Pa., also stocks and bonds in various railroad, "mining, manufacturing and bridge companies to the "nominal amount of several hundred thousand dollars, "also various judgments, mortgages and unsold lots in "Beaver Falls and New Brighton of the estimated value "of several hundred thousand dollars; also while it may "be possible that said society may have a large amount "of property after the payment of its debts I am entirely "satisfied to accept as my full share and interest therein "said five thousand ($5,000) dollars, and I will never "hereafter make any claim for further or other payment "of any sum whatever, nor the delivery of any other prop-

"erty of said society to me no matter what may be the "value of the property and assets of said society after "payment of its debts (all such claims thereto being by "me hereby expressly barred and discharged).

"Witness my hand and seal this seventeenth day of "May, 1893.

"In presence of "SIGMUND STIEFVATER."

"W. H. BREITENSTEIN."

"This release was translated into German by the trus- "tees, John S. Duss, and Samuel Sieber, and he said that "he understood the same before signing."

"W. H. BRIETENSTEIN."

From the above formal instrument it appears that Mr. Duss proceeded as a liquidating trustee would proceed, in lieu of the receiver sought for under the Feucht bill; except that such amicable partition was unknown to the public, while under the Feucht bill the heirs of deceased members could intervene for the purpose of conserving the trust or offering proof of their interest in the estate of the defunct society. Not only do these quit claims for the first time in the history of the society by express terms recognize individual ownership in the property in the society, but they acknowledge in consideration of the money paid or land conveyed that he or she does "hereby release, cancel and discharge any and all claims whatsoever which *I, my heirs, assigns or lawful representatives,* may or could ever have against said society or its trustees, its property or assets, or any part thereof, I hereby declaring all such claims to be fully compensated, settled, released and discharged;" and again, after reciting the various properties and assets of the society, the paper provides, "I am entirely satisfied to accept as *my full share and interest therein five thousand dollars,*" *etc.*

Another paragraph in Exhibits Nos. 10 and 12½, signed by eight members, is as follows: "While it may be that said society may have and be *the possessor of several hundred thousand dollars worth of property after paying all debts* I am entirely satisfied to *accept as my full share therein* the sum of thousand dollars." After these settlements began the Feucht bill was dismissed by consent of the plaintiffs.

The evidence shows that at this time there were about forty members in the society, and that each member as he was settled with, received on the average about five thousand dollars—so that they apparently got their full per capita share of the assets of the society, i. e., one-fortieth of several hundred thousand dollars—without the risk of its subsequent diminution or any delay in payment. As a natural result the members began leaving promptly. The evidence taken in this suit developed the fact that after "paying all debts" there remains between four and five million dollars of assets. By the wording in the above quit claim, it appears that Mr. Duss could, if it were legal, dissolve the society by paying off from time to time all the members, so that he and his wife would alone remain, becoming thereby the self-created survivor with millions of assets undisposed of. Further comment is necessarily reserved for the argument. In addition to the payment of money, five members received *real estate* of the society worth over $25,000. (*Vide* Exhibit 10, Record, page 240.)

It is true that the former trustees had on some occasions been accustomed to make small donations to retiring members, but with one exception, such amounts ranged from fifteen to fifty dollars.

As for instance, in the year 1890, when Jacob Henrici was Senior Trustee and Mr. Duss Junior Trustee, Lena Fritsch, a member of the society, desired to withdraw and return to Germany to live. The following are the two receipts she signed (Record, page 240):

EXHIBIT NO. 8.

RECEIPT—LENA FRITSCH.

"After having become on the 14th day of February, of this year, a member of the Harmony Society at Economy, I have this day (October 22, 1890,) withdrawn myself, of my own free will therefrom, and have ceased to be a member of said society; have also received this day from Henrici and Duss, trustees, ninety-five ($95) dollars, in order to pay my traveling expenses and such like, which sum is in full of my claims on said society or any member thereof."

"Witness: "LENA FRITSCH."

"H. GASSER,

"J. E. HIRSCH."

EXHIBIT NO. 9.

RECEIPT—LENA FRITSCH.

"The undersigned hereby declare that she has received from Messrs. Henrici and Duss, trustees, the sum of twenty-four ($24) dollars, for the purpose of an advance to go on a trip, and she promises herewith to repay this sum in case her circumstances in Germany shall make it possible for her to spare this money.

"Witness my hand, this 23rd day of October, 1890.

"Attested by "LENA FRITSCH."

"J. E. HIRSCH."

At the time Lena Fritsch departed the appellants do not contend that the scheme of liquidation was then being carried out, but that the same took form in the beginning of the year 1893, shortly after the death of Senior Trustee Henrici, who presided over the society for nearly 50 years. When she left, the society was apparently prosperous, and yet she is made to agree to return the trifling sum of twenty-four dollars. When the other members began taking "their share" in 1893, Mr. Duss asserts, and is supported by the master, that the society was hard pressed for ready money. One of the members, Leonard Hoerer (Exhibit No. 7), had joined the society about 90 days before and left with thousands of dollars in consideration for signing a paper that acknowledged "his interest" in the property of the society was fully compensated. As this tribunal is called upon to declare whether these later payments of money and conveyances of land were mere "donations," as found by the master, or on the other hand, deeds of settlement and liquidation, we have printed in full all of these Exhibits in the Record.

The members thus retiring before the present bill was filed include about all the male members of the Board of Elders of the Harmony Society, including the Junior Trustee and all the men having in charge, as foremen or superintendents, the various departments of labor and industry, such as farming, wagon shops, saw mills, tailor shops, etc. The two remaining male members, Messrs. Kellerman and Gilman (the former of whom has since died), were negotiating for their interests with Mr. Duss, when notice from the present appellants apparently stopped further payments.

The master found that the Feucht bill caused these withdrawals.

This, appellants contend, is immaterial, although it may be true in one aspect of the case, viz., that the members having concluded to wind up the society for various reasons, and becoming alarmed over Duss' peculiar statement of assets and liabilities, were willing to have Mr. Duss, by amicable partition, put into practical effect the very thing sought for by certain members under the Feucht bill. The evidence shows that three-fourths of the members who had been settled with at the time of the filing of the present proceedings were not only defendants in the Feucht bill, but were the avowed friends of Mr. Duss, and with few exceptions occupied all the positions of influence and importance within the society; the reasons given by the master for these settlements are so extraordinary, and his construction of the quit claims as mere "donations," so peculiar that an analysis of this same must be confined to the argument.

After all the male members but one of the Board of Elders had been settled with and retired, the Board of Elders was filled with six remaining female members, who comprised the remnant; an event without precedent in the society, for up to that time a woman had never been elected an elder. The women thus selected, with the exception of Susie C. Duss, the wife of the Senior Trustee, were either old, infirm or ignorant, or were women recently admitted into the society and could not talk English.

The ready money of the society having now been apparently exhausted (some of the members being paid out of a mortgage that was put on the property, in order to meet in part the payment of their shares), the next step was taken for the alienation of the homes and all the real estate of the society by putting it in such shape that the survivors would hold it as personal property.

Mr. Duss, in active co-operation with his attorney, devised a plan for the conversion of all the real estate of the society into the capitalistic stock of a business corporation. At this time he was aware that the heirs of deceased members were protesting against the division going on. He, in conjunction with the survivors, conveyed the entire town of Economy, and its fields of agriculture surrounding it, to a corporation known as the "Union Company." By that act, the appellants contend the society, then in a process of liquidation, was wiped out entirely as a recognizable entity.

The Union Company was organized very quietly, under the General Corporation Act of 1874, by Mr. Hice, attorney for the society, his two sons, and W. S. Morrison and W. J. Stuart, on January 17th, 1894 (plaintiff's "Exhibit No. 27," of Record). Its capital stock was fixed at $5,000, with 100 shares of the par value of $50, and the application stated that the "said corporation is formed for the purpose of the purchase and sale of real estate, or for holding, leasing and selling real estate," and that "the business of said corporation is to be transacted in the borough of Beaver, County of Beaver, State of Pennsylvania." This application was granted by the Governor, and on the 16th day of February, 1894, it was recorded in Beaver County.

The evidence shows that the ulterior purpose of organizing the Union Company in the above manner was to defeat the present complainants, and at the same time affect the public, particularly the State of Pennsylvania, in the name of which escheat proceedings had been commenced, or were contemplated. No sooner was the charter obtained on the application of Hice *et al*, than simultaneous steps were taken to increase the capital stock of the Union Company to $400,000, and to have the trustees of the Harmony Society convey all the land of the society to the Union Company in payment of the increase of part of the capital stock.

Plaintiffs' Exhibit No. "28," is the authorization of the increase of capital stock, and the stockholders who voted were the same individuals who appeared in the application for the charter.

Plaintiffs' Exhibit No. "29," is a copy dated April 12th, 1894, of the treasurer's return of increase of capital stock from $5,000 to $400,000—"said additional stock (395,000) being issued for real estate situate in Allegheny and Beaver Counties, Pennsylvania, which has been conveyed to the company.

Defendants' Exhibit "H," page Record, purports to be an authorization by the members of the Harmony Society to the trustees thereof to convey all the lands of the society to the Union Company in consideration of stock to the extent of three hundred

ninety-seven thousand and five hundred ($397,500) dollars, out of a total of four hundred thousand ($400,000) dollars. Next comes a whereas in said exhibit as follows:

> "WHEREAS, The trustees of said society are advised that "a suit is about to be brought against it in the name and "on behalf of a large number of persons who claim to be "lawful heirs of certain deceased members of said so- "ciety, the object of said suit being to compel the society "to pay large sums of money to said persons as portions "of the society's property claimed to be due to said per- "sons as heirs of such deceased members, which claims we "regard as totally unfounded."

This averment is important as showing the knowledge of the pendency of the present proceedings and a desire to put the property out of reach before the legal proceedings began.

Then said exhibit recites the advantage of having the land of the society represented by capital stock of an incorporated company, so that the same might be disposed of more readily; then follows the consent and request of the members that J. S. Duss and G. Riethmueller, trustees, convey to the Union Company "all the lands, tenements and hereditaments, situate in Allegheny and Beaver Counties, Pennsylvania, now owned by the society, to the end that all said lands, tenements and hereditaments may be *owned, held and managed by said incorporated company, and be sold and otherwise disposed of* from time to time, in pursuance of proper corporate action, ***as may be determined by the directors and officers of said incorporated company.***" This paper was executed April 11th, 1894, and contains in addition to the individual signatures and acknowledgments of the surviving members, also the separate acknowledgments of Johanna Hermansdoerfer and Susie C. Duss, wives of two of the members of the society, indicative apparently of the fact that individual ownership and dowry rights were now recognizable in the property.

In pursuance of this authority the property of the society was conveyed by the trustees to the Union Company, which land not only included *the home of the society*, with its mills, factories,

shops, the separate home of each member, the residence or Great House of the trustees, the society's house of worship, and the gardens and surrounding farms, all these passing to this corporation *for the purposes of sale as its directors might determine*, and the property conveyed also included the society's cemetery, containing the remains of Fathers Rapp, Baker, Henrici and Lenz, and the other deceased members of the society since 1825; *which burial place also contained the bodies of the parents, the brothers and sisters or other near kinsmen of the present complainants.* In said deeds to the Union Company the society's remaining property in the town of Beaver and all that in the County of Allegheny is likewise included.

The secrecy of these proceedings prior to the time the present complainants filed this bill, resulted in the allegation in paragraph 20th thereof, that the conveyance to the Union Company was without the consent or knowledge of the members, other than the trustees and Mrs. Duss. In this they were mistaken, having no knowledge of Exhibit "H." It is therefore a fact that the conveyance of the society's home to the Union Company was authorized so far as the personal assent of the members could bring this about.

As the results of the transfer of all the property by the surviving members of the society to the Union Company, the said members became merely *tenants at will* of the Union Company; the authority having been given to make a conveyance to the corporation, contemplating and directing the sale of said real estate, it became possible and was the duty of the directors of said Union Company to sell the property, thus turning the realty into money, so that the joint and indivisible property of the society became personalty, as it is necessarily to-day, when represented by the capital stock of the Union Company. The alleged existing communistic society being without a home and not bound by the Articles of Association to remain anywhere in particular, either within the State of Pennsylvania or even in the United States, is in a position to depart at will, taking with it in cash or stock certificates, the very property now in controversy, all of which is referred to in the argument.

The Union Company, instead of having its place of business in Beaver, Beaver County, after re-organization changed its office to the City of Pittsburgh, County of Allegheny, where its di-

rectors meet, composed (at the time the testimony closed) of two of the surviving members of the Harmony Society, and *three non-members*. Mr. Dickson testified that the directors of the Union Company managed all the affairs of the real estate covered or controlled by it, and that the Board of Elders have no control over it or the management of the results of the real estate of the Union Company.

When members of the Harmony Society filed a bill for dissolution, and later proceeded to distribute the assets of the society among themselves, and the remaining survivors conveyed the rest of the property to a private business corporation to be managed and sold by a Board of Directors, passing out of the control of the Board of Elders, the situation necessarily compelled appellants to act at once or not at all. Hence this proceeding.

It is unnecessary to repeat at length the allegations of the complainants, for they are based upon substantially the facts hereinbefore recited. That this Court may have before it in a condensed form some of the more important averments of the complainants, we print paragraphs 25 and 26 of said bill:

> "25th. That recently said Harmony Society has be-
> "come dissolved as aforesaid, that all of its purposes and
> "practices established as aforesaid by the founder of said
> "society, and by the ancestors of your orators, have been
> "abandoned; that its chief assets, consisting of bonds,
> "stocks and other securities, and the town of Economy,
> "with its buildings and the adjacent lands of said society,
> "consisting of some 3,000 acres, and which constituted the
> "basis of organization and business of said society, have
> "been sold and conveyed away by the said Duss as afore-
> "said in fraud, however, of the rights of your orators
> "and their co-tenants, and that by reason of the facts here-
> "inbefore set forth your orators and the said last mem-
> "bers, except the said Duss and wife, are now tenants in
> "common of all of said lands and tenements, and entitled
> "to partition thereof in proportion to their respective in-
> "terests.
>
> "26th. That for some time past the members of said
> "Harmony Society have been retiring therefrom and have

"received the amount of their interest in said association "in the land or money, or both, the land being set apart in "severalty to them, and have released all of their rights and "interests in said association in consideration for such "payment or conveyance to them, and that by said retire- "ment and withdrawal the membership of said association "has been reduced to the persons hereinbefore named "members; that by common consent this association has "ceased to exist as an association, and that if the property "thereof has ever been impressed with a trust (which "your orators deny as being contrary to public policy and "void in law or equity), such trust has wholly ceased, and "the assets of such dissolved association have reverted to "the donors thereof, among whom were the ancestors and "intestates of your orators."

It was duly established in this case that the present appellants are the sole next of kin of members dying in the society since 1836, being the sons, brothers and nephews of leading members of the Harmony Society. It was shown, for instance, that in 1826, Christian Schwartz, at the age of three years, went with his parents and five brothers and sisters to Economy. All became members of the Harmony Society and died in fellowship, except Christian Schwartz, who, when reaching the age of twenty-one, after working in the society from childhood, desired to marry, departed with the niece of Mrs. Kriter, a member of the society, taking up his residence in Charleston, West Virginia. Several members of the Schwartz family did not die until the year 1889; most of them serving the society faithfully for more than sixty years, working in the mills, in the factories and in the fields, and serving on the Board of Elders; the total service of this family alone aggregating more than three hundred years of unrequited toil. Their bodies, together with the remains of the other relatives of the appellants, lie in the quaint graveyard of the Harmony Society, which has been sold to a business corporation without any reservation made for the protection of their remains from disturbance. The appellants filed this bill to determine whether the heirs could prevent such acts of spoilation, and the subsequent division of the fruit of their kinsmen's labor among the self-created surviving members, who instead of striving to perpetuate the society are now dividing its property and accumulations among themselves. *This is, in reality, the sole issue in the case.* The appellants contend that if this Court

does not reverse or modify the decree of the lower Court dismissing the bill, that no bar whatever stands in the way of the purchased withdrawal of the other members, and a further conversion and devolution of the assets of the society, so that they will be beyond reclamation by those entitled thereto.

The master's report is open to criticism which will be more fully disposed of on argument. It is suffcient to say in this place that he recommends a decree for the dismissal of the bill and imposes the costs upon the complainants, first to be advanced by defendants. The record shows that the master, on March 15th, 1899, received from John S. Duss, trustee, his fee of $3,000, fixed in this case.

The appointment of a master in Equity causes in the United States Court is an unusual proceeding, but his appointment resulted from frequent refusals of Mr. Duss, before the examiner, to answer questions deemed important by the complainants, so that it was resorted to for the purpose of saving time on arguments on questions certified to the lower Court.

In regard to the financial transactions growing out of the wrecking of the Economy Savings Institution, a private partnership bank, located in the town of Beaver, Pa., it is only necessary to state that none of these matters are now before the present Court for review, but as the master saw fit in his report, in line with the argument of defendants' counsel, to devote much space to this subject, it is proper to state that the appellants only questioned the legality and propriety of Mr. Duss' methods in turning nearly thirteen hundred thousand dollars into a bank that the evidence shows was utterly wrecked by two of its officers and partners, who were not members of the Harmony Society, and the transfer of this vast sum, constituting the greater portion of the investment funds of the society, into the treasury of this broken bank was done apparently without the knowledge or consent of the members of the Harmony Society. It appears to have been the act largely of Mr. Duss and his attorney, Judge Hice, the latter one of the partners in this bank. It seemed to appellants that the situation that confronted Mr. Duss warranted the appointment of a receiver for this bank, so that its debts might be paid according to law, thereby collecting from these outside partners either the full loss or at least their *pro rata* share of the

same. This was never done, and Messrs. Hice and Reeves, two of Mr. Duss' most important witnesses in this case, have been relieved from their partnership liability to this bank. At that time the society had only a direct indebtedness of three hundred thousand dollars, amply secured, and if the society became hard pressed for money, it was largely due to Mr. Duss' hasty methods of settling the bank's affairs without the intervention of the courts; and why the master should devote so much space to this subject is inexplicable, for we think that Mr. Duss is open to censure rather than to praise for the manner in which he diverted nearly a million and a half of the society's money. But whether this is true or not we cannot see how these financial questions in any wise relate to the case as it now stands on the present Assignment of Error. Should a receiver be appointed by this Court, Mr. Duss will then have ample opportunity to explain his very peculiar methods of financing a bank in which this society was alleged to be, through its trustees, a partner, while the other partners who had largely caused its downfall contributed nothing.

The report of the master dismissing the bill was sustained by the Circuit Court in a very brief opinion, no independent consideration being given to the legal questions raised then and renewed in the present Assignment of Errors. The Court, however, gave as a reason for imposing the costs upon the complainants that they had charged immorality and had failed to prove it. Immorality was proved and so found by the master, except in the case of Mr. Duss. As the Circuit Judge, in an interlocutory opinion had denied the complainants the right to offer proof against Mr. Duss, *vide* Record, page 191, we have assigned this as error. The Circuit Court of Appeals affiirmed the opinion of the lower Court, without passing upon any of the forty-eight assignments of error and adopted *verbatum* the brief opinion of the lower Court—so that the law and facts established in this cause rests, primarily, upon the opinion of the master, whose appointment was brought about to save loss of time caused by a contumaceous witness. The principal facts are admitted in this case—the differences arise on the legal inferences to be drawn therefrom.

ASSIGNMENTS OF ERROR.

First. That the Court erred in affirming the decree of the Circuit Court of the United States for the Western District of Pennsylvania, which decree is as follows:

> "And now, this 13th day of February, 1899, upon consideration it is ordered, adjudged and decreed that the "plaintiffs' bill be, and the same is hereby dismissed; and "it is further ordered, adjudged and decreed that the "plaintiffs pay the costs, including the master's fees, to "be fixed, *seg. reg.*, and which, together with his compensation as examiner, shall be paid to the master in "the first instance by the defendants.—BY THE COURT."

Second. That the Court erred in holding that the appellants were barred from maintaining their bill, and from the relief sought thereby, because the appellants had no claim on the property of the Harmony Society through any of their ancestors, and because, if the appellants have such legal demands against the society, those demands have been barred by lapse of time.

Third. That the Court erred in holding that the Harmony Society is in full life, and that there had been no dissolution of the society by the common consent of the members, or by their acts.

Fourth. That the Court erred in holding as follows:

> "It is not necessary, nor would it be proper for the "Court to express any opinion as to what would be the "legal status and the ultimate disposition of the property "of the Harmony Society were its existence terminated "by the death of all its members, or were the dissolution "of the society otherwise effected. No such questions "are before us; we are not dealing with the assets of a "defunct or dissolved association."

Fifth. That the Court erred in not finding that by the agreement of 1836, all who were then members of the society, and who afterwards became members of the society, became owners in and to an equal undivided share of all the property of the said society, real and personal, which by the agreement of 1836 was converted into a joint and indivisible fund, and that, therefore, upon the event of the dissolution of the association from any cause whatever, in the absence of provisions in that agreement for the distribution of said fund, the said joint and indivisible fund is to be distributed among all persons dying in the society, and the legal heirs and representatives of those who died in the society.

Sixth. That the Court erred in refusing appellants' contention that the trusts created for the benefit of the Harmony Society violated the rule against perpetuities, and is therefore void, and in consequence, in default of a remainder over, or other provision, the same reverts to the members of the society if living, or in the event of death, to the heirs and legal representativs of those who have died members of the society since 1836.

Seventh. That the Court erred in refusing appellants' contention that the Harmony Society, being unincorporated and not organized for any religious, scientific, charitable or literary purpose, is incapable of holding real and personal estate, directly or through trustees, for its benefit and that the trusts created for the benefit of the said society are void and revert by way of resulting trust to the members of the society living and to the heirs and legal representatives of those who have died members of the society since 1836.

Eighth. That the Court erred in refusing appellants' contention that the purposes and principles, mode of organization and government prescribed and contemplated by the various articles and constitutions of the society, are against public policy, and that the trusts created for the benefit of the said society are therefore void and revert as aforesaid by way of resulting trust to the donors, if living, and to their heirs and representatives, if dead.

Ninth. That the Court erred in refusing plaintiffs' contention

that the constitution and agreements of the Harmony Society contemplated no end to the life of the society, and made no provision for such event, and the trusts provided no remainder over upon the death or dissolution of the society from any cause, or upon the failure of the trusts from any cause, and that the said trusts did not create a joint tenancy with right of survivorship in the members, but was an express trust for the society as a society.

Tenth. That the Court erred in holding as follows:

> "There has been no dissolution of the society either "by the common consent of the members, or by their "acts. The membership indeed, has become greatly re-"duced, but the rights of the society as now constituted, "are as sacred in the eye of the law as they were when "the membership was twenty-fold greater."

Eleventh. The Court erred in refusing to hold that numbers are an essential feature of the principle of communism as established by the articles of association, and that the paucity of numbers of surviving members disabled the society for maintaining the principles for which the society was founded, or the mode of agreement provided for in the said articles of association.

Twelfth. The Court erred in refusing to hold that the partition of the assets and property of the society, among the members just prior to the filing of plaintiffs' bill, was not an act of liquidation and dissolution.

Thirteenth. The Court erred in finding that the conveyance to the Union Company did not work a dissolution of the society, and that the same did not wholly terminate the existence of said society, not only as to the government thereof by the Board of Elders and by the members, but also as to the ownership of any property.

Fourteenth. That the Court erred in refusing to appoint a receiver and decree the other reliefs prayed for in the bill.

Fifteenth. That the Court erred in imposing the costs of this case upon the plaintiffs who are admittedly the next of kin of ancestors dying in the society, and who sue as entitled to the trust estates of the society by way of resulting trust.

ARGUMENT.

This appeal is before this Court by allowance of a writ of certiorari to the United State Court of Appeals for the Third Circuit. The Court of Appeals affirmed the decree of the Circuit Court of the United States for the Western District of Pennsylvania, in an opinion by Mr. Justice Gray, which was adverse to the appellants' cause.

The opinion of Mr. Justice Gray adopts in large measure the opinion of Judge Acheson.

The important questions now raised by appellants' assignments were disposed of mainly in both of these opinions, by a general aaffirmance of conclusions of the master, and consequently in the argument of this cause, appellants have occasion to review the master's conclusions.

The subject matter of this controversy consists principally of about three thousand acres of land situated on the Ohio river, having a frontage of over three miles on the river, about fifteen miles below the City of Pittsburgh. On each side of this land and opposite to it, are great industrial establishments. The land itself is traversed by two great railroad lines; on it the town of Economy is built, containing about three hundred houses, the great house, mills, manufactories, vineyards, and many very productive and valuable gas and oil wells, and the graveyard where repose the remains of members of the society who have departed this life since the year 1825. The value of this property is at least four millions of dollars.

The society or that which is called the society, has been reduced

from great numbers down to eight members, most of whom were admitted to membership in 1890, the others in the year 1888; and none of them have ever contributed any money to the society. While the laws of the society call for a Board of Eldership of nine members, there are but eight members of the society living, and of these six are women, and mostly advanced in years, except John S. Duss, the present patriarch, and his wife, who are in the prime of life, and who by the tables of mortality, have largely in their favor the chances of surviving the other members. No new members have been admitted since the year 1893, and since that time seventeen of the younger members have been allotted the alleged value of their interests in the property of the society, and have left the membership; and death has taken all the rest except the eight who now survive.

Under the laws of the society, the real possessors of the property of the society, with the power and enjoyment thereof, are the trustees; for the other members can claim nothing but their lodging, maintenance, clothing, drink, medicines and the privileges of church.

The main underlying question is, shall the last survivor take this magnificent estate as his very own, because he is, or may come to be, the last survivor? Is this estate in its tenure a joint tenancy with right of survivorship, or a system of tontine, built up by the fortunes of dead and gone members, by their unrequited labors of many years, their deprivation of all social and civil life, during which they were subjected to a degraded servitude, all for the enrichment of some unforeseen and unknown adventurer, who might by prearrangement or otherwise come to be the last surviving member of the society.

The appellants have found themselves unable to bring before this Court the voluminous testimony taken before the master, and are therefore unable to review all the errors which would thereupon be made manifest. They are necessarily restricted now to those errors which rest upon conclusions, and can be supported upon the limited record of this case.

So much, therefore, of the master's report as deals with accounts and figures; of reasons why certain acts were done by the trustees; of alleged wrongful attacks upon the conduct of John S. Duss, and of specific disreputable acts constituting the substitution of debauchery and vice in those in control of the society —which otherwise would be matters assignable as errors—cannot be considered under the assignments of error to which we are limited by circumstances beyond our control.

PROPOSITIONS SUBMITTED BY APPELLANTS.

The propositions which counsel for appellants propose to argue are briefly, these:

FIRST. The articles or agreements of the Harmony Society executed prior in date to those of October 31, 1836, provided for a free gift or donation of all the property of persons seeking to be adopted into the society, to George Rapp and his associates, for the USE AND BENEFIT OF THE COMMUNITY; upon the condition however, that upon his withdrawal from the society, the member withdrawing, was to receive back the value of his contributions, without interest, in instalments.

SECOND. By the articles of October 31, 1836, all the members of the society agreed with each other, to surrender this right of property restitution which each possessed, and to convey the same to ALL the members in equal shares. To that end they entered into this compact:

> "All the property of the society, real, personal and "mixed, in law or equity and howsoever constituted or "acquired shall be deemed, now and forever, joint and "indivisible stock. Each individual is to be considered "to have finally and irrevocably parted with all his for- "mer contributions, whether in lands, goods, money or "labor, and the same rule shall apply to all future con- "tributions, whatever they may be."

The articles of 1836 constituted a contract between individuals to whoch the society as such was not a party.

THIRD. The property thus held, was impressed with a trust for the benefit and use of the society as such by those who then represented the ownership of this joint and indivisible stock. All future members were to become parties to the articles of 1836, and as each new member came in, he became owner of an equal share of the property, subject to the trust.

A. Thus the donors of all the properties of the society to the trust, are all the members of the society now living, and all those dying members of the society since the articles of 1836, and now represented by their heirs and legal representatives.

B. The sole donee of the trust was the Harmony Society; the members as such are not donees.

C. So long as the purposes of the trust are observed and maintained, the donors of the trust funds were entitled only through the society as the beneficiary, to any of the benefits of the trust; when they were not so maintained and observed, the property of the trust reverts to the donors by way of resulting trust.

FOURTH. The trust properties are and always have been held by absolute title and in fee simple, without disclosure upon the face of the deeds of the trustee of the character of the grantees, or any reference to any trust, or with any remainders over. The trusts, therein, are however established by declarations of trusts.

No terminal period of the life of the society is prescribed; no provision is made for the ultimate destination of the trust properties upon either the death of the society, or failure of the purposes of the trust. There are no provisions any where creating a joint tenancy with right of survivorship, or systems of tontine.

FIFTH. Assuming then the death of the society from any cause—a failure of the Trusts created from any cause—the CORPUS of the trust property, reverts by way of resulting trust to ALL members of the society, dying in the society since the articles of 1836, their heirs and legal representatives, and to all living members in equal shares, AS DONORS of the joint and indivisible stock, constituting the corpus of the trust estates, and not to the surviving members as donees, or beneficiaries of the trust.

SIXTH. Among the class of donors and distributees as aforesaid, are the plaintiffs, who are the heirs and legal representatives of ancestors, donors, dying in the society, since 1836.

SEVENTH. Assuming, ex gratia argumentii, that the trusts are validly created for the benefit of the society, AS A SOCIETY, counsel for appellants claim that the existence of the society has terminated by acts of liquidation, partition, and divestiture by the trustees of title to all its property; by paucity of members, and by inability and incapacity to enforce the scheme of government, and the principles and purposes of the society, and hence the purposes of the trusts have failed, and the property reverts as aforesaid.

EIGHTH. Independently of the life or death of the society, the trusts are void in law:

(a) The principles, purposes and form of government of the Harmony Society, for the maintenance of which the trusts were established, are contrary to public policy.

(b) The society being unincorporated, and having no religious, charitable, literary or scientific purpose in the legal sense is incapable of holding property directly, or through trustees for its benefit.

(c) The trusts violate the rules against perpetuties, and the Pennsylvania Statutes regulating accumulations.

And for these or any of these reasons, the corpus of the trust properties reverts to the donors as aforesaid, by way of resulting trust, clear of the trust, and hence, the decree of the Court of Appeals should be reserved.

I.

By the articles of the society prior to those of 1836, contributing members to the trusts reserved the right to restitution of their property upon withdrawal from membership.

The first known articles affecting the individual rights and duties of persons admitted to membership in the society, are dated February 5, 1805, are in evidence as Exhibit "A" and are printed in this record at page 218.

For the more ready reference to its terms we embody those articles at length in this argument.

To this agreement the Harmony Society is not a party. It is wholly between individuals; those who are already members and those who propose to become members are covenanting with each other as to the terms and conditions of adoption, and the rights of adopted members.

> "Be it hereby known to all who need to know it that "the following agreement has this day been made and "concluded between us, the subscribers of the one part, "and George Rapp and his associates of the other part:
>
> "ARTICLE 1. We the subscribers, on our part and on "the part of our heirs and descendants, deliver up, re-

"nounce and remit all our estate and property consisting "of cash, land and chattels or whatever it may be, to "George Rapp and his associates in Harmony, Butler "County, Pennsylvania, as a free gift or donation, for "the benefit and use of the community there, and bind "ourselves on our part, as well as on the part of our heirs "and descendants, to make free renunciation thereof, "and to leave the same at the disposal of the superin- "tendents of the community, as if we never had nor pos- "sessed it.

"ARTICLE 2. We do pledge ourselves jointly and "severally to submit to the laws and regulations of the "community, and to show due and ready obedience "toward those who are appointed and chosen by the "community as superintendents in such a manner that "not only we ourselves endeavor, by the labor of our "hands, to promote the good and interest of the com- "munity, but also to hold our children and families to "do the same.

"ARTICLE 3. If, contrary to our expectation, the "case should happen, and we jointly or severally could "not stand to it in the community, and we would within "a few or more years break our promises and withdraw "from the community, for whatever cause it may be, "never to demand any reward, either for ourselves or "children or those belonging to us, for any of our labors "or services rendered, but whatever we jointly and sev- "erally shall or may do, we will have all done as a vol- "untary service for our brethren.

"In consideration whereof George Rapp and his as- "sociates adopt the subscribers jointly and severally as "members of the community, whereby each of them ob- "tains the privilege to be present at each religious meet- "ing; not only they themselves, but also their children "and families, shall and will receive the same necessary "instructions in church and school which is needful and "requisite for their temporal good and welfare as well as "eternal felicity.

"ARTICLE 4. George Rapp and his associates prom- "ise to supply the subscribers jointly and severally with "all the necessaries of life, as lodging, meat, drink and "clothing, etc., and not only during their healthful days, "but also when one or more of them become sick or oth-

"erwise unfit for labor, they shall have and enjoy the "same support and maintenance as before; and if, after "a short or long period, the father or mother of a family "should die, or be otherwise departed from the com- "munity and leave a family behind, they shall not be left "widows or orphans, but partake of the same rights and "maintenance as long as they live or remain in the com- "munity, as well in sick as healthful days, the same as be- "fore, or as circumstances or necessity may require.

"Article 5. And if the case should happen as stated "above, that one or more of the subscribers after a short "or long period, should break their promise and could "or would not submit to the laws and regulations of the "church or community, and for that or any other cause "would leave Harmony, George Rapp and his associates "promise to refund him or them, the value of his or their "property brought in without interest, in one, two or "three annual installments, as the sum may be, large or "small; and if one or more of them were poor and "brought nothing into the community, they shall, provided they depart openly and orderly, receive a donation in money according to his or their conduct while a member, or as he or their circumstances and necessities may require, which George Rapp and his associates shall determine at his or their departure.

At present all we wish to do is to direct the attention of the Court to questions of property therein contained and the trusts therein created:

By Article 1, the candidates for adoption covenant on their part to deliver up to George Rapp and his associates at Harmony, Butler County, Pennsylvania, all their estate, consisting of cash, land or chattels, as a free gift or donation *"for the benefit and use of the community there,"* as fully as though they had never had or possessed it.

By Article 5, if for any cause one or more would leave Harmony, George Rapp and his associates promised to refund him

or them the value of his or their property brought in without interest in one, two or three annual installments, as the same may be large or small.

ARTICLES OF 1821.

The second agreement in order of time is dated January 20, 1821, and was executed in the State of Indiana, whither the society had removed a few years before. It is Exhibit "B," and is printed at length on page 220 of this record. It deals only with adoptive members, who contribute labor only.

ARTICLES OF 1827.

The next articles in point of time are dated March 9, 1827, and were executed in Harmony, Butler County, Pennsylvania, whither the association had removed. (Record, page 221.)

These are not articles of adoption, but seem to constitute an agreement between all the members, reciting for the first time in writing, the purposes of the community, the conditions of membership, and defining the rights, privileges and duties of every individual therein so as to prevent mistake, or disappointment on the one hand and contentions and disagreements on the other. They are of great importance; are continued in force by every subsequent agreement, except in one particular.

The first article is a conveyance to George Rapp and his associates *and their heirs and assigns*, of

> "All our property, real, personal and mixed, whether
> "it be lands and tenements, goods and chattels, money
> "or debts due to us, jointly or severally, in possession
> "or in remainder, or in reversions, or in expectancy,

"whatsoever or wheresoever, without evasion or quali-
"fication, or reserve, as a free gift or donation, for the
"benefit and use of the said association or community."

The trustees took title to themselves, their heirs and assigns, but upon a contemporaneous express trust for the society, subject also to the right of withdrawal of property, which each member reserved to himself, as appears in Article 6.

That article is in almost the same terms as Article 5 of 1805.

By Article 6 it is expressly agreed that in case of withdrawal from the association, the said George Rapp and his associates who held the titles (subject to the trust) would refund to the withdrawing member the value of all property without interest, which he may have brought into the community in compliance with the first article of the agreement.

It is thus apparent:

A. That thus far every member retained such ownership and control of his contributed property as enabled him to withdraw it, or its value, when he left the society, without interest. The same then ceased to be a perpetual free gift but became at the will of the withdrawing member, subject to purchase by the trustees.

B. That the trust properties were held in fee simple by the trustees, but were subjected by the articles to a trust for the benefit and use of the community, and subject also to the right of reclamation aforesaid.

George Rapp and his associates took vested estates in fee simple, determinable first: upon the failure of the trusts, in favor of all the members in the proportion of their contributions; and sec-

ond: determinable as respects individuals withdrawing, to the extent of the contributions of such withdrawing contributors.

The articles of 1827 (Exhibit "C," Record, page 221), are repeated here at length for more convenient reference:

"WHEREAS, By the favor of Divine Providence, an as-"sociation, or community, has been formed by George "Rapp and many others, upon the basis of Christian Fel-"lowship, the principles of which being faithfully derived "from the sacred Scriptures, include the government of "the patriarchal age, united to the community of prop-"erty adopted in the days of the apostles, and wherein "the single object sought is to approximate, so far as "human imperfection may allow, to the fulfillment of "the will of God, by the exercises of those affections, and "the practice of those virtues which are essential to the "happiness of man in time and throughout eternity:

"AND WHEREAS, It is necessary to the good order and "well-being of said association that the condition of "membership should be clearly understood, and that the "rights and privileges and duties of every individual "therein should be so defined as to prevent mistake or "disappointment on the one hand, and contention or dis-"agreement on the other:

"*Therefore*, Be it known to all whom it may concern: "That we, the undersigned, citizens of Beaver County, "in the Commonwealth of Pennsylvania, do severally "and distinctly, each for himself, covenant, grant, and "agree to and with the said George Rapp and his asso-"ciates, as follows, to wit:

"ARTICLE 1. We, the undersigned, for ourselves, our "heirs, executors and administrators, do hereby give, "grant and forever convey to the said George Rapp and "his associates, and their heirs and assigns, all our prop-"erty, real, personal and mixed, whether it be lands and "tenements, goods and chattels, money or debts due to "us, jointly or severally, in possession or in remainder "or in revision, or in expectancy, whatsoever or where-

"soever, without evasion, or qualification, or reserve, as "a free gift or donation, for the benefit and use of the "said association or community; and we do hereby bind "ourselves, our heirs, executors and administrators, to "all such other acts as may be necessary to vest a perfect "title to the same in the said association, and to place "the said property at the full disposal of the superintend-"ents of the said community without delay.

"ARTICLE 2. We do further covenant and agree to "and with the said George Rapp and his associates, that "we will severally submit faithfully to the laws and regu-"lations of the said community, and will at all times "manifest a cheerful and ready obedience toward those "who are or may be appointed as superintendents "thereof, holding ourselves bound to promote the inter-"ests and welfare of the said community, not only by the "labor of our own hands, but also by that of our chil-"dren, or families and others who now are or hereafter "may be under our control.

"ARTICLE 3. If contrary to our expectations, it "should so happen that we could not render the faithful "obedience aforesaid, and should be induced, from that "or any other cause to withdraw from the said associa-"tion, then and in such case, we do expressly covenant "and agree to and with the said George Rapp and his "associates, that we will never claim or demand, either "for ourselves, our children, or for any one belonging "to us, directly or indirectly, any compensation, wages "or reward whatever, for our or their labor or services "rendered to the said community, or to any member "thereof; but whatever we or our families jointly or sev-"erally shall or may do, all shall be held and considered "as a voluntary service for our brethren.

"ARTICLE 4. In consideration of the premises, the "said George Rapp, and his associates, do by these pres-"ents, adopt the undersigned, jointly and severally, as "members of the said community, whereby each of them "obtains the privilege of being present at every religious "meeting, and of receiving, not only for themselves, but "also for their children and families, all such instructions "in church and school as may be reasonably required, "both for their temporal good and for their eternal fe-"licity.

"ARTICLE 5. The said George Rapp, and his associ-"ates, further agree to supply the undersigned severally "with all the necessaries of life, as clothing, meat, drink, "lodging, &c., for themselves and their families; and this "provision is not only limited to their days of health and "strength, but when any of them shall become sick, in-"firm, or otherwise unfit for labor, together with such "medicine, care and attendance and consolation as their "situation may reasonably demand. And if at any time "after they have become members of the association, the "father or mother of a family should die or be otherwise "separated from the community, and shall leave their "family behind, such family shall not be left orphans or "destitute, but shall partake of the same rights or main-"tenance as before, so long as they remain in the associa-"tion, as well in sickness as in health, and to such extent "as their circumstances may require.

"ARTICLE 6. And if it should happen as above men-"tioned, that any of the undersigned should violate his "or her agreement, and would or could not submit to "the laws and regulations of the church or community, "and for that or any other reason, should withdraw from "the association, then the said George Rapp, and his as-"sociates, agree to refund to him or them the value of all "such property, without interest, as he or they may have "brought into the community in compliance with the "first article of this agreement, and the said value to be "refunded in one, two or three annual installments, as "the said George Rapp and his associates shall deter-"mine. And if the person or persons so withdrawing "themselves were poor, and brought nothing into the "community, yet if they depart openly and regularly, "they shall receive a donation in money, according to "the length of their stay, and to their conduct, and to "such an amount as their necessities may require, in the "judgment of the superintendents of the association."

It seems to be clear that so far this condition of rights and property existed:

A. In the event of withdrawal of members each would have restitution of his contributed property.

B. In the event of a voluntary or other dissolution of the society, or of a failure of the trusts for any good and legal cause, the corpus of the trust estates would be distributed to the contributors *as* contributors, and not as donees, on the basis and in the proportions of their individual contributions of property.

II.

By the Articles of 1836, the owners of this right of restitution conveyed to all the members of the society in equal shares, and to all future members all their individual rights of restitution which they then had, and described the same as a joint and indivisible stock, and impressed the property with a trust for the benefit and use of the society.

In 1836 the members of the society, each having such right, in varying amounts, proportioned on his general contributions, agreed with each other:

(1) That the property, then in the hands of trustees, upon the trusts aforesaid, should no longer be held subject to re-clamation upon the basis of original contribution, but that the whole aggregate should become a common fund, in which each member should be equally interested, as fully as though all the property had originally been contributed equally. When any of the contingencies happened which would defeat the trust, the distribution of the property therefore would be made *equally* among all members, and not on the old basis and proportion of contributions made.

(2) That this was an agreement between individuals competent so to contract, and who did so contract upon sufficient consideration.

(3) That thenceforth the members as individuals were equal instead of unequal owners, subject only to the trusts, and each had the same right of reversion equally, as each before had in unequal proportions.

(4) That as such equal owners they impressed upon the joint property the same trust which had previously existed for the benefit and use of the society.

(5) That they were therefore as individuals, donors of the corpus of the trust properties; the society as a society as the donees and the members as members, had no relation whatever as beneficiaries; but their only relation was as donors in common with all other members in the event of reversion upon failure of the trust.

(6) And this contract was so drawn as to include in the *corpus* of the trust, all future contributions, accretions and accumulations, and to admit as donors thereof all future admitted members.

As we cannot well condense the articles of 1836, we print it in full, as it appears in the record (page 224):

"WHEREAS, The Harmony Society, consisting of "George Rapp and many others, now established in the "town of Economy, in Beaver County, Pennsylvania, did, "on the 9th of March, 1827, enter into certain articles of "association, of which the 6th in number, is as follows, "viz.:

"And if it would so happen as above mentioned, that "any of the undersigned should violate his or their agree-"ment, and would, or could not, submit to the laws and

"regulations of the church or community, and for that or "any other cause should withdraw from the association, "then the George Rapp and his associates agree to refund "to him or them the value of all such property as he or "they may have brought into the community, in com- "pliance with the first article of this agreement, the said "value to be refunded without interest, in one, two or "three annual installments, as the said George Rapp and "his associates shall determine.

"And if any person or persons so withdrawing them- "selves were poor, and brought nothing into the com- "munity, yet if they depart openly and regularly, they "shall receive a donation in money, according to the "length of their stay and to their conduct, and to such "amount as their necessities may require in the judgment "of the superintendents of the association.

"AND WHEREAS, The provisions of the said 6th arti- "cle, though assented to at the time, manifestly depart "from the great principle of a community of goods and "may tend to foster and perpetuate a feeling of inequality "at variance with the true spirit and objects of the as- "sociation:

AND WHEREAS, The principle of restoration of prop- "erty, besides its pernicious tendency, is one which cannot "now be enforced with uniformity and fairness, inasmuch "as the members of the association, in the year 1818, "under a solemn conviction of the truth of what is above "recited, did destroy all record and memorial of the re- "spective contributions up to that time:

AND WHEREAS, Continued happiness and prosperity of "the association, a more intimate knowledge of each "other, have removed from the minds of all members the "least apprehension of injustice and bad faith:

"*Now, Therefore,* Be it known by these presents, that "the undersigned, with a view to carry out fully the great "principles of our union, and in consideration of the bene- "fits to be derived therefrom, do hereby solemnly enter "into covenants, and agree with each other as follows:

"1st. The said 6th article is entirely annulled and "made void, as if it had never existed; all others remain "in full force as heretobefore.

"2nd. All the property of the society, real, personal "and mixed, in law or equity, and howsoever, contributed "or acquired shall be deemed now and forever joint and

"indivisible stock. Each individual is to be considered "to have finally and irrevocably parted with all his for- "mer contributions, whether in land, goods, money or "labor; and the same rule shall apply to all future con- "tributions whatever they may be.

"3rd. Should any individual withdraw from the so- "ciety, or depart this life, neither he, in the one case, nor "his representatives in the other, shall be entitled to de- "mand an account of said contributions, whether in land, "goods, money or labor, or to claim anything from the "society as matter of right. But it shall be left altogether "to the discretion of the superintendent to decide whether "any, and if any, what allowance shall be made to such "member, or his representatives as a donation.

"Invoking the blessing of God on this sacrifice of all "narrow and selfish feelings to the true purposes of the "association and to the advancement of our own per- "manent prosperity and happiness, we have signed the "foregoing instrument, and affixed thereunto our re- "spective seals, at Economy, this 31st day of October, "1836."

There then stand clearly and distinctly three classes:

III.

First. Those who own the "joint and indivisible stock" in equal shares.

The sole condition of their ownership is membership in the society.

Second. Those owners create a trust for the use and benefit of the society, and, as such, consent that their joint and indivisible stock shall constitute the corpus of the trust property now held by trustees.

Third. The Harmony Society is the sole beneficiary as an organized community.

The members of the society are not beneficiaries; they are always changing; they have no place in the deeds or in the terms of the trust as beneficiaries.

So long as the trusts are in force, the society alone has the benefit of the trust property; when they cease to be in force the properties cannot go to the members as surviving members exclusively, but as we contend, only to them in common with all the other owners, members of the society since 1836, dying in the society, their heirs and legal representatives, as owners of this "joint and indivisible stock," and as givers of the same to the trustees, upon the recited trusts.

THE SUBSEQUENT ARTICLES.

The subsequent articles between the members in no wise affect the status of the membership, their relation to the properties of the society, the creation of the terms of the trust, or any of the conclusions we have attempted to draw from the preceding articles. We need only make in this stage of our argument very brief reference to them.

ARTICLES OF 1847.

The first of these subsequent articles is dated in the year 1847. (See record page 225.)

George Rapp had always been the sole patriarch, and the recognized despotic ruler of the members, by laws and regulations of his own enacting, with powers of admission, expulsion, punishment; and was the absolute controller and dispenser of the properties and of accretions from labor of members.

When his death occured in 1847, it became necessary to vest these extreme powers in some successor, without change as to their extent and powers of enforcement. The articles of 1847 did create and nominate a Board of Elders of nine members, who were self-perpetuating, the board alone having the power to fill all future vacancies. A Board of Trustees consisting of two members of the Board of Elders, also named, was also constituted. The eldership had the power to fill vacancies in the trusteeship. As we will hereafter show, these boards alone have the enjoyment, power and control of the property of the society; the lay or unofficial members have only the portion of unpaid servitude and labor and the sole compensation to them is their lodging and maintenance.

Instead of a single patriarch, the articles of 1847 substitute a dual patriarchy consisting of the two boards.

These articles also expressly recognize, re-establish and continue the preceding articles of agreement of March 9th, 1827 (excepting the restoration clause, article 6), and of October 31st, 1836; and they are to be read into the articles of 1847.

The sixth clause declares the trust upon which property is to be held. To that clause we shall refer hereafter more fully.

Another clause provides that subscribing this agreement of 1847, is a condition imposed upon new members, and such subscription is to be evidence of their membership, and of the rights acquired by, and the duties imposed upon, them.

ARTICLES OF 1890.

The purpose of these articles, dated July 31st, 1890 (record page 228), are: (a) To recognize, approve, re-affirm and continue the last recited article of 1847, which, as we have shown, had re-affirmed the precedent articles of 1827 and 1836. (b) To ratify and confirm appointments by the Board of Elders of successors to deceased members of the Board of Elders, and of the Board of Trustees, and confirming their acts in those capacities.

Nothing in these articles vary or affect any of the provisions of any precedent agreement, and do not in anywise have bearing upon our present contentions.

ARTICLES OF 1892.

These articles are dated December , 1892. The purposes of these articles (Record, page 232) are:

(*a*) To confirm the articles of 1847; (*b*) to recite the names of the then members (thirty-six in number); (*c*) conditions imposed upon new members; (*d*) declaring the names of existing Boards of Elders and of trustees; (*e*) enlarging the powers of the trustees to borrow money on mortgage loans; (*f*) to authorize either of the trustees to sign the joint names of the trustees in the execution of any of the powers of the trustees.

ARTICLES OF 1894.

These articles dated April 11th, 1894 (record page 106), while wholly in excess of any power or right existent in the members—have no relevancy or bearing upon the present topics of discussion.

Its main intent is to authorize the trustees to divest themselves of their duties and obligations, and to transfer them and all the trust

properties for a false consideration to a capitalistic Pennsylvania corporation organized for profit.

We have shown:

First. The ownership of the property which went into the trusts for the society, and who those owners were.

Second. That they created trusts of their own property for the use and benefit of the society.

Third. That those trusts were created for the society as a community, and not for the benefit of surviving members.

Fourth. And that the trustees hold the titles by deeds and instruments in fee simple.

IV.

The Titles of Trustees, and Declarations of Trusts.

First. Article 1 of the articles of 1805 (Record, page 218), contains the grant of the property of admitted members to George Rapp and his associates, as trustees "for the use and benefit of the community."

Second. The Articles of 1821 (Record, page 220), gives labor of members unconditionally and without other recompense or reward, other than lodging, maintenance, etc., to the common fund.

Third. The articles of 1827 (Record, page 221), give property of members in possession or expectancy, reversion or remainder to George Rapp and his associates, their heirs and assigns, for the benefit of the community, reserving right of restitution.

Fourth. The articles of 1836 repeals the 6th clause of the articles of 1827, reserving to members the right of restitution.

Fifth. The articles of 1847 (Record, page 225) provides as follows, viz.:

> "ARTICLE 6. It is hereby distinctly and absolutely "declared and provided that all the property, real, personal "and mixed, which now or hereafter shall be held or ac- "quired by any trustee or trustees or person under them, "is and shall be deemed the common property of said "society, and each trustee now or hereafter appointed, "hereby disclaims all personal interest in the present re- "sources and future earnings of the society, other than "that of a member thereof, according to the articles of "association hereby re-established and continued, and ac- "cording to the present agreement."

Sixth. The master in his report (Record, page 65) finds as follows:

> "Prior to his death in 1834, Frederick Rapp, a mem- "ber of the society, had been the business agent of the so- "ciety, transacting its external business. After his death, "the members of the society, on July 5th, 1834, executed "a power of attorney to George Rapp (Exhibit No. 85 "in evidence) constituting him general agent of the so- "ciety in all its temporal affairs, with power to appoint "agents and substitutes under him. Under this power, he, "on the same day, appointed Romulus L. Baker and Jacob

"Henrici his substitutes. This power of attorney was "signed by four hundred and two members of the associa- "tion, and, with the substitution, and not including the "signatures, is as follows:

"Know all men by these presents: WHEREAS, Fred- "erick Rapp, of Economy, in Beaver County, State of "Pennsylvania, recently deceased, was for a series of "years the agent in temporal affairs of the Harmonie So- "ciety, carrying on in his own name all the external busi- "ness of said society, and taking to himself the titles to "real estate, as well as the evidence of claims arising out "of the various transactions of said society;"

"AND WHEREAS, By an instrument dated the 20th "July, 1825 u,nder the hand and seal of said Frederick, "he solemnly and irrevocably declared that all the prop- "erty, real, personal and mixed, which then was, or here- "after might be in his possession or enjoyment, or the "title to which he then held or might hereafter hold, was "and should be considered the property of the said society, "in which he, the said Frederick, had no absolute interest "whatever;

"AND WHEREAS, The lamented death of the said "Frederick Rapp renders it indispensable that a new agent "should be appointed, by whom the temporal affairs of "the society may continue to be managed in a mode which "has proved convenient and satisfactory;

"*Now, Therefore,* Be it known that we the under- "signed, constituting said Harmonie Society, do hereby "nominate and appoint George Rapp, of Economy, in the "County of Beaver, the general agent of said society in all "its temporal affairs.

"The powers intended to be conferred on the said "George Rapp are hereby declared to be as follows, that "is to say:

"1. To ask for, demand and receive from each and "every bank or other incorporated company, partnership, "or individual person or persons, the amount which may "be due therefrom, in the way of principal, interest or "dividend to the said Harmonie Society, or to Frederick "Rapp, whether the same be evidenced by judgment. "mortgage, bond, certificate of stock, note, bill of ex- "change, deposit of money, book account, verbal promise, "sale or barter, loan of money, or a rise in any other man-

"ner whatsoever the check, order, receipt, acquaintance "or release of the said George Rapp to be as effectual as if "executed by all and each of us, or as if it had been exe- "cuted by the said Frederick Rapp in his life time.

"2. To execute and receive all deeds and convey- "ances, in fee simple or otherwise, on behalf of the society, "whether the title thereto stand in the name of the society, "or of Frederick Rapp, or of George Rapp and associates. "The act of the said George Rapp relative thereto to be "as valid and sufficient as if executed by us or by the said "Frederick Rapp in his life time.

"3. To carry on, by himself or through the agents "whom he is hereinafter authorized to appoint, all the "dealings and traffic of said society of every description.

"4. To constitute and appoint an agent or agents under "him as he may deem advisable, imparting to such sub- "stitute or substitutes, should he think fit, the whole or "any portion of the authority hereby conferred on him- "self. He may also, at his pleasure, revoke such instru- "ment of substitution whenever he may think such revo- "cation called for by the interests of the society.

"5. It is distinctly understood that in accepting and "acting under this power, the said George Rapp disclaims "all personal interest, other than that of a member of "said society, in the present resources or future earn- "ings of the society, in conformity with the principles "and terms upon which the Harmonie Society was origi- "nally founded, as fully and effectually as was done by "the late Frederick Rapp, in the instrument already "averred to, dated 20th July, 1825, the terms of which in- "strument the said George Rapp hereby adopts for him- "self, and repeats in every particular.

"In witness whereof the undersigned members of the "Harmonie Society, who constitute said society, have "hereunto set their hands and seals at Economy, in "Beaver County, this fifth day of July, in the year of our "Lord, eighteen hundred and thirty-four."

(Signatures.)

"By virtue of the authority expressed in the fourth "article of the foregoing power of attorney I do appoint "and substitute in my place and stead, Romulus L. Baker "and Jacob Henrici, of Economy, Beaver County, Penn- "sylvania, to act as general agents of the Harmonie So-

"ciety aforesaid, jointly or severally in my name, and for "the use of the said society to do and perform all acts and "things which as the general agent of said society I am "authorized to do. It being distinctly understood, how- "ever that in accepting and performing the office and "business of general agents of the said society the said "R. L. Baker and Jacob Henrici shall neither acquire nor "claim any personal interest in the present resources or "future earnings of the said society other than that of a "member of the said society, agreeably to the plans and "terms of association, but shall be considered as exercising "the same trust mentioned in a declaration of trust signed "by Frederick Rapp on the 20th day of July, 1825, and "referred to in the foregoing power of attorney to George "Rapp.

"Witness my hand and seal this fifth day of July, A. D. "eighteen hundred and thirty-four.

"GEORGE RAPP." [SEAL]

Seventh. The articles of 1847 (Record, page 225), provide:

"Article 6. It is hereby distinctly and absolutely "declared and provided that all the property, real, per- "sonal and mixed, which now or hereafter shall be held "or acquired by any trustee or trustees or person under "them, is and shall be deemed the common property of "said society, and each trustee now or hereafter ap- "pointed hereby disclaims all personal interest in the "present resources and future earnings of the society, "other than that of a member thereof, according to the "articles of association hereby re-established and con- "tinued, and according to the present government."

Eighth. The subsequent articles of 1890, 1892 and 1894 all recognize the trust character and purposes of the trustees under which the trust properties of the society were held, as by reference thereto will more fully appear. (Record, page .)

V.

These trusts have been recognized by the Courts below and by all Courts in which the affairs of the society have been under consideration, as express trusts for the benefit of the society as a society.

Judge Acheson, in the Circuit Court below, and Justice Gray in the Court of Appeals (quoting and adopting his language) recognized this express trust. We quote:

> "It is not necessary, nor would it be proper, for the "Court to express any opinion as to what would be the "legal status and the ultimate disposition of the prop- "erty of the Harmony Society were its existence ter- "minated by the death of all its members, or were a dis- "solution of the society otherwise effected. No such "questions are before us. We are not dealing with the "assets of a defunct or dissolved association."

VI.

The immediate and underlying question is, therefore, to whom does the corpus of the trust property go, in the event of the defeat of the trusts from any cause whatever?

It must go either:

1. To the owners of the property who subjected it to the trusts as owners or donors, living, and to the heirs and legal representatives of those of them who are dead, share and share alike, by way of resulting trust; or

2. To the surviving members of the society as joint tenants with right of survivorship, or by way of tontine; or

3. It must escheat to the state.

AS TO ESCHEAT.

We respectfully submit that this property in the hypothesis mentioned does not escheat.

Blackstone says that the law of escheat "is founded upon

> "this single principle that the blood of the person "seized in fee simple is by some means or other utterly "extinct and gone; and since none can inherit his estate "but such as are of his blood and consanguinity, it fol- "lows as a regular consequence that when such blood is "extinct, the inheritance must fail."

The Pennsylvania Statute of May 2, 1889, P. L. 66 (Purdon's Digest, page 798, pl. 1), provides:

> "From after the publication of this Act, if any person "whom at the time of his death, was seized or possessed "of any real or personal estate within this Common- "wealth, has died or *shall die intestate, without heirs or "known kindred* * * * * such esate of whatsoever kind "the same may be, whether legal or equitable, or whether "the same was held by the said person in severalty, or as "tenant in common, co-tenant, joint tenant, or in part- "nership, with any other person or persons, shall es- "cheat. * * "

As this society is not incorporated, but is unincorporated, and as it is not organized for any religious, charitable, literary or scientific purpose, and can hold no property, it cannot be brought within the statutes of Pennsylvania, which relates to the disposition of trust estates by way of escheat.

In the statutes relating to religious, charitable, scientific and educational purposes, an escheat is declared only when corporations for such purposes have exceeded the limitations of their powers as defined by those statutes. A corporation can of course have no next of kin; it possesses no inheritable blood. But an unincorporated association preserves the individuality of its members and their inheritable qualities. And there is no escheat, as long as there are heirs to take.

The trust properties cannot be considered *bona vacantia*, because the original owners of the trust properties under the articles of 1836 have the reversionary right to them, upon the failure of the trusts, and where such original owners are dead then such reversionary right passes to their heirs, under the intestate laws of Pennsylvania.

In short, escheat is a forfeiture which never operates so long as persons may be found who are entitled thereto lineally, or collaterally, within the meaning of the term "next of kin."

The real question then lies between all those who, as owners of the trust properties created the trusts, on the one hand, and the surviving members as such survivors on the other, and there is an irreconcilable conflict between the two.

The present membership has dwindled to eight persons—less than enough to fill the Board of Elders; the Board of Trustees has been reduced to one person, John S. Duss. The Board of Elders have no members to govern, control or direct. The Board of Elders consists of two men and six women, Duss and his wife counting for two. All the others are aged or ignorant. Practically John S. Duss is the last survivor, and he claims the ownership of this vast estate as such survivor.

And the appellees, who are seeking to possess themselves of the property, necessarily contend that the scheme of the society and of the trusts contemplate and create a joint tenancy with the right of survivorship, or a system of tontine, which excludes all but living members, and casts the estate upon the survivor. And in this they are wrong.

NOT A JOINT TENANCY:

It is almost inconceivable that the creators of this property and of this trust ever dreamed that their property was to be diverted from their heirs in the event of the dissolution of the society; or that they were constituting an estate which in the distant future, with all its accumulations and accretions, the profits of their labor, otherwise unpaid for, was to vest in fee simple in some last survivor who, it may be, might be absolutely removed in sympathy with the objects of the society, and whom it was impossible for them to know. Is it possible to conjecture, in the absence of express language, that the utter abandonment of property, of the power of individual accumulation, of their hard labor and toil, their deprivation of all the individual enjoyments, their utter subjection to the tyrannical will of despotic patriarchy, were all meant for the future enrichment of some survivor, who perchance became such survivor by contrivance to defeat the very life of the society, to come into his inheritance like an impatient heir—or that the graveyard in which repose the remains of their ancestors, and which was intended to contain theirs, was to pass into the possession and ownership of some distant last survivor, rather than to their own direct heirs, when the purposes of the trust had failed?

If such was the thought, why not have said so? There is not one word in any of the articles of the society, nor in any declaration of trust, nor in any deed of title, which contemplated the extinction of the society, at any future time; or an abandonment of its principles and purposes, nor makes any provision for a remainder over upon the failure of the trusts, or gives any indication of any intent, express or implied, to create a survivorship or scheme of tontine.

Either joint tenacy with right of survivorship, or tontine, must be the result of *express agreement*. They cannot be presumed by construction.

Examine each and every one of the articles of this society, and so far from finding any provision for the ownership of the property in case of illegality or dissolution, you will find nothing except the contemplation of an enduring and never-ending existence. No provision is made for a termination of existence.

Survivorship is under the ban of the law.

We quote from the Act of 5th of March, 1812, Section 1, 5th Smith, 395:

> "If partition be not made between joint tenants, "whether they be such as might have been compelled "to make partition or not, or whatever kind the estate "or thing holden or possessed be, the parts of those "who die first will not accrue to the survivors, but shall "descend or pass by devise and shall be subject to debts, "charges, curtesy or dower or transmissible to execu- "tor or executors, and be considered to every other in- "tent and purpose in the same manner as if such "deceased joint tenants had been tenants in common; "provided always, that nothing in this Act shall be taken "to affect any trust estate."

Only trustees take by survivorship, and they alone are excepted.

There is no arrangement in the articles that the last survivor is to receive the whole.

The essence of tontineism consists in reserving for the last survivor among several investors the profits realized from their common investments. And this demands express written covenant.

Neither survivorship nor tontine can be presumed.

We might concede that while the society exists consistently with its principles, and in good faith, and in accordance with the law, it may hold and enjoy the common property; yet when it ceases to exist, and the time for distribution comes, the members do not take the property in severalty as survivors, but distribution is to be made equally among all the members signatories of the articles of 1836, those living, and the heirs and next of kin among those dead.

To hold otherwise is to introduce into the articles provisions not to be found there, and to construe them, so that Duss, potentially being the last survivor, takes those vast estates as his own; and he, who came into the society in 1890, *a poor man—who never contributed one dollar to the funds of the society*—will find himself enriched of the estate of those who for many years contributed to the wealth of the society by hard labor, and who died in the society in full membership.

Such a construction has been acted upon by him. He has admitted no new members since 1892. He has depleted the funds of the society in the purchase (by paying large sums) of the interests of seventeen members in full health and vigor, solely with a view to hasten this survivorship. He has yielded to the temptation described by Judge Irwin, in his opinion in the Nachtrieb case.

That learned jurist, who had before him Henrici, Baker and all the old members of the society, and was made thoroughly acquainted with the articles of 1836, and the preceding articles, with the faith, beliefs and purposes of the society, held that it was not then and "*had not been determined* that ultimately all the prop-"erty of the society is to vest in one or a few of its members."

Commenting upon a construction which might in the future be made that survivorship existed, he says:

> "*Unless human nature should be proof against the* "*strong temptation to hasten such a result*, the dissolv-"ing element would be always at work. The unwritten "rules of the society, inconsistent with natural rights

"and liberties as seen beyond its own limits, the death of "its members, the expulsion of others with or without "cause and the prohibition of marriage, and the lawful "intercourse of the married, would in time so reduce "the community in numbers as to make it expedient and "proper in the opinion of the survivors to dissolve and "divide the possessions. It is not meant to infer that "any such ulterior result is projected, or that in view "of it, it in any way influenced the proceedings against "the plaintiff (Nachtrieb); it is noticed simply for the "purpose of glancing at an undisputable and imputed "right which will attach to each member of the commu- "nity at its dissolution; an event it may be near or re- "mote; but which not unreasonably, such member may "think may happen in his life time, and to value accord- "ingly, with its disadvantages if any, the privileges of "membership."

The case of Kane *vs.* Gibbony, 101 U. S., 362, applies with full force. In that case there was a bequest to the Bishop of Wheeling, or to his successor in said dignity, upon a trust that in the event the testatrix should afterwards become a member of any of the religious communities attached to the Roman Catholic Church, and remain so at the time of her death, the said Wheelan, Bishop, and his successor in said dignity was constituted a trustee for the benefit of the community of which the testatrix might be a member. The said property or money to be expended by the said trustee for the use and benefit of said community. The testatrix became a member of the community known as the Sisters of St. Joseph, which was unincorporated.

Justice Strong held, among other things, as follows:

"That is an *unincorporated association*, and it is the "association as such and not the individual members "who composed it when the testatrix died which is de- "clared to be the beneficiary. * * * Its members must "be constantly changing and it must always be uncer- "tain who may be its members at any given time. No "member can assert claim on individual benefits from "the bequest, or assert that she is a *cestui que* trust; and "the community having no *legal* existence, can never

"have *standing in court to call a trustee to account.* "This bequest is, therefore, plainly invalid unless it can "be supported as a charity, and it is far from evident "that it is a gift of charitable uses. It looks more like "private bounty. Charity is generally defined as a gift "for a public use. Such is its legal meaning, and here "the beneficial interest is given to a religious commu- "nity, but not declared to be for religious uses. There "is nothing in the will to show that aid to the poor or aid "to learning, or aid to religious or to any humane ob- "ject was intended."

In that case there was no remainder over; the gift was to the community and not to the members, and the corpus of the gift was held to revert to the testatrix's heirs.

It was not thought in that case that the estates were still to be held to vest in the last survivor of the community.

And so, in the case of Cummack *vs.* Edwards (The Law Times, 1 Ch. 386),

"Syllabus—In 1810 a society was established to raise "a fund, by the subscriptions, fines and forfeitures of its "members, to provide annuities for the widows of its "members. In 1830 the rules were revised, and the so- "ciety conformed to the provisions of the friendly "societies—Act of 1829, but the object of the society "was not in any way altered. In 1848, Edwards be- "came a member and remained a member until 1878, "when he died a widower. Edwards was the last surviv- "ing member. The last honorary member who, on join- "ing, disclaimed all benefit of the society for his widow, "died in 1879. The last annuitant died in 1892.

"The legal personal representative of Edwards, hav- "ing claimed the unexpended fund of the society "amounting to 1750 pounds;—

"Held—That the society was not a charitable insti- "tution to which the doctrine of cy-pres could be ap- "plied, and that on this point the fact that there were "honorary members whose donations were applicable

"for the benefit of widows of members made no differ-
"ence; that the representatives of Edwards, surviving
"member, were not entitled to the funds, neither was the
"Crown entitled to them, as *boni vacantia*, but that
"there was a resulting trust in favor of the members of
"the society, from time to time, of their respective, legal,
"personal representatives, in shares in proportion to the
"amounts contributed by each member to the funds of
"the society."

This was an action by the trustees of a fund, to obtain the direction of the Court.

In March, 1810, a society called the Nelston Equitable Annuitant Society was established, for the purpose of raising from time to time, by the subscriptions of the members, and fines and forfeitures, a stock or fund, for the relief of widows of the deceased members of that society. By Rule 16, these funds were to form the capital stock of the society, to be invested by the Treasurer in the names of the trustees for the time being, upon approval of a majority of the managing committee or by a majority of the society, and by rule 35, it was provided that on the death of any member, after having been admitted four years and having paid his annual contributions and other payments required by the rules, and conformed to the same in all respects, his widow should be entitled to such an annuity as was set forth in the table for that purpose provided, so long as she should continue a widow.

Edwards was an ordinary member, and died in 1878, and at the time of his death was a widower, and was the last surviving ordinary member. There was only one honorary member, who, on joining disclaimed any benefit in favor of his widow.

There was no provision in the rules as to the ultimate disposition of any unexpended funds after paying all the annuities. The last annuitant died in 1892.

The legal personal representative of Edwards claimed the un-

expended funds, and the surviving trustees instituted this action against that representative, and also the Attorney General.

Chitty, J., after reciting the facts in the case, after holding that the claim of the Attorney General that the funds might be applied cy-pres, as impossible, says as follows:

> "The claims are, first, the representative of the sur-"viving ordinary members; secondly, the Attorney "General on behalf of the Crown; and thirdly, the rep-"resentative of the deceased member appointed to rep-"resent for the purpose of this hearing, all the deceased "ordinary members. As a body the claim of the repre-"sentative of the last surviving member may be disposed "of in a few words. The society was not a tontine so-"ciety, and there is no ground for saying that the fund "belonged in equity to the last survivor. There is noth-"ing in the rules, or in any principle of equity, applicable "to the case on which this claim can be raised. * * * "The contention for the Attorney General was that the "funds were *bona vacantia*, and that the Crown was en-"titled to them by virtue of its prerogative. It is in "virtue of this prerogative right that the Crown takes "the personal estate of a man who, being a bastard, dies "intestate and without leaving issue. Such a bastard "can have no next of kin. The Crown's right attaches "on the proof of the bastardy, and no lawful issue of the "bastard—subject, of course, to the right of any widow "he may leave. But in case of the death, intestate, of "the person born in wedlock, the Crown does not take "merely because there is difficulty in finding the next "of kin. An inquiry is directed, and sometimes re-"peated, to find the next of kin, and it is not until every "reasonable step by advertisement and otherwise, has "been taken that the fund is ordered paid to the Crown. "The mere fact that there will be great expense and dif-"ficulty in ascertaining the equitable owner of a fund is "not, of itself, sufficient ground for declaring the Crown "entitled. The claim of the person appointed to rep-"resent the deceased members generally is founded "upon the doctrine of resulting trusts. Where a man "provides a fund by way of trust, for payment of a speci-

"fied annuity to his widow during her life, and makes "no further declaration of trust effecting the fund, the "beneficial interest in the fund or so much of it as is not "required for payment of the annuity, results to himself. "The same doctrine would apply to the case of several "persons agreeing to provide and providing such an- "nuities for their widows; there would be an ultimate "trust in their favor, when the purposes of the fund "would come to an end. Nor can I see how any differ- "ence could justly be made, by reason of their raising "by common agreement such a fund, in different but "prescribed proportions among themselves. Inasmuch "then, as all the purposes for which the fund of the so- "ciety was raised by the contributions of the members, "have been exhausted, and there is no indication to be "found in the rules as to what was to be done with the "funds when the specified purposes were worked out, I " am constrained to hold, according to the principles of "equity, that the doctrine of resulting trust applies. It "is immaterial that no actual declaration of trust was "made by the trustees in pursuance of rule 17 of the "society. * * * I therefore make a declaration that in "the events which have happened the funds are subject "to a resulting trust in favor of the ordinary members "of the society from time to time, or their respective le- "gal representatives, in share in proportion to the "amounts contributed by each ordinary member to the "funds of the society." * * *

The case just cited bears fully upon the case at bar. In our case the plaintiff's ancestors, together with others dying in the society since 1836, and the present members, are equally interested in the "joint and indivisible stock," under the articles of 1836, and as such devoted it in trust as donors for purposes which have failed.

The chancellor in that case could find no basis for an award to the last survivor.

We submit that wherever this trust estate may ultimately go, it cannot go to the last surviving members or member.

VII.

The Estate Base or Determinable Fees.

The estates which the trustees have taken in fee, qualified by their declarations of trusts, upon which they were so granted, are determinable, base, or qualified fees, and there is to be read into them, in the construction of them, the provision that when the purposes for which they were so granted have failed, the estates will revert by way of resulting trust to those who granted them living, and to the heirs and legal representatives of those who are dead.

Assuming for the present that the trusts are valid, that the Harmony Society is in law a competent taker, then the grants are in the nature of a base or conditional or determinable fee, and upon the failure of the purpose for which the grant was made or the trusts created by dissolution or otherwise, then the property reverts, by way of resulting trust, to the donors and their heirs or legal representatives.

The grants of the real estate purport to convey a fee simple; the title to the personal estate is absolute.

The trust covering them all is for the use and benefit of the society.

The condition, therefore, is, that when the society reaches the end of its existence, the purpose for which the grant was made and the trust created having failed, the property necessarily reverts to the donors and their heirs or legal representatives.

There is no terminal period fixed for the life of the society; there is no joint tenancy with right of survivorship or tontine scheme for the individual members; the property cannot vest in the trustees

divested of the trust, nor can the fee simple float around without a taker, on the happening of the condition. There is, therefore, no place for it to go, unless it escheats—which it cannot do, so long as there are persons competent to take—except to the donors or their heirs or legal representatives, by way of resulting trust.

The Court sustains the master in holding that the trust is for the society as a society. Therefore, it is not for individual members as members. The society as such is absolutely distinct from its members as such. The latter die and new members are admitted, and none of them at any time have title to the property.

In the event of the dissolution of the society, those who are then members share proportionately, not because they are interested as *grantees*, but because by the articles of 1836, they being equally interested in the "joint and indivisible stock," which comprehends all the property of the society, then possessed or afterwards acquired, as *grantors* or *donors* of the trust property, and *so* share proportionally only by way of reversion, because the grant was conditional upon the life of the society.

We quote the terms of the trusts as given in various articles.

July 20, 1825 (M. R. 142), Frederick Rapp, under his hand and seal,

> "Solemnly and irrevocably declared that all the prop-
> "erty, real, personal and mixed, which then was or here-
> "after might be in his possession or enjoyment, or title
> "to which he held or might hereafter hold, was and
> "should be considered the property of the said society
> "in which he, the said Frederick had no absolute interest
> "whatever."

July 5th, 1834 (M. R. p. 145), George Rapp, in pursuance of authority to appoint agents and trustees under him, given him by article of the same date, executed the following instrument:

"By virtue of the authority in the fourth article of the "foregoing power of attorney, I do appoint and sub- "stitute in my place and stead, Romulus L. Baker and "Jacob Henrici, of Economy, Beaver County, Pennsyl- "vania, to act as general agents of the Harmonie So- "ciety aforesaid, jointly and severally in my name, and "for the use of the said society to do and perform all "acts and things which as the general agent of said so- "ciety, I am authorized to do. It being distinctly under- "stood, however, that in accepting and performing the "office and business of general agents of the said society, "the said R. L. Baker and Jacob Henrici shall neither "acquire nor claim any personal interest in the present "resources or future earnings of the said society other "than that of a member of the said society, agreeably to "the plans and terms of the association, but shall be con- "sidered as exercising the same trust mentioned in a de- "claration of trust signed by Frederick Rapp, on the 30th "day of July, 1825, and referred to in the foregoing "power of attorney to George Rapp.

"Witness my hand and seal this fifth day of July, "A. D. eighteen hundred and thirty-four."

August 12, 1847 (M. R. 150), after providing that the "powers hereby vested in the said trustees shall extend to and embrace all the property of said society, real, personal or mixed, whether standing in the name of the late Frederick Rapp, the said George Rapp or in any other name whatsoever," contains the following:

"ARTICLE 6th. It is hereby distinctly and absolutely "declared and provided that all the property, real, per- "sonal and mixed, which, now or hereafter shall be held "or acquired by any trustee or trustees, or person under "them, is and shall be deemed the common property of "said society, and each trustee now or hereafter appointed "hereby disclaims all personal interest in the present re- "sources and future earnings of the society other than "that of a member thereof, according to the articles of as- "sociation hereby re-established and continued, and ac- "cording to the present agreement."

It will be remembered that the Board of Trustees are also members of the Board of Elders, all of whom must be members of the society.

When the purposes cease, the objects for which they were given no longer exist, the maintenance of the principles contemplated are abandoned, then the grants terminate and the property reverts to the grantors and their heirs.

If, therefore, the system of patriarchal government is abandoned; if the communistic scheme has been subverted and a capitalistic scheme substituted; if the religious beliefs have been departed from; if al lthat made the society distinctive disappears, if it has become a trading community; if it is a transgressor of the laws; if it is insolvent; had gone into a process of liquidation; if it had parted with the control of all its property; if it had abandoned the form of management of even the articles of 1847; if its "joint and indivisible stock" has been perverted into outside adventures, and perverted to the purchase of interests of members; if the trustees have schemed to prevent the admission of new members, to deplete existing membership, to secure survivorship; if after covering its property with mortgages it has made conveyance of every foot of land, every asset, every means of living, without the ownership of a roof to cover the head of one of its members, and taken to itself the shares of a trading corporation, then we confidently say, that the purposes for which the grants were made have entirely ceased and failed, and under the authorities must revert to the original grantors or their heirs.

In the case of Slagel *vs.* Lauer, 148 Pa. St., 236, plaintiff's ancestor conveyed for a money consideration, a strip of land to the Commissioner of Berks County, to and for the use, intent and purposes following—to be forever hereafter unbuilt on, in order to prevent prisoners making escape by reason of contiguous buildings. The jail in 1849 was removed more than one mile from its old location.

The question was whether on the cessation of the use of the land for the purpose of the jail, it reverted to the grantor's heir. And it held it did.

The Court says:

> "It must not be forgotten that such a fee is neverthe-
> "less a fee simple because it may last forever in a man
> "and his heirs, the duration depending upon the con-
> "currence of collateral circumstances which qualify or
> "debase the purity of the grant. 2 Black. Com., page 109.
> "The *qualification must be found in the instrument it-*
> "*self*. * * * * But no especial or technical words are re-
> "quired to establish it. * * * What is needed is that
> "the deed on its face contain a reservation or declare a
> "specific purpose for which the land was conveyed and
> "from which the reservation may be implied. Caton J.,
> "in Adams Co. *vs.* Logan Co., 11 Ill., 336.

The Court then distinguishes certain cases in which the grant was for purposes in which counties usually acquire land.

And on page 244, distinguishes those cases and decisions which relate to the construction of a deed as conveying an estate on *condition subsequent*, and deny that effect to a recital that the grant is upon a certain consideration, or to a collateral covenant—and says: "The purpose here is not recited as part of the consideration, nor is its observance collaterally covenanted. Nor is the estate here granted one upon condition."

Again: "Of course upon the determination of a base fee, the property reverts to the grantor: 2 Black Com. pages 109, 110; without any claim or act on his part where it is determinable by limitation. * * * * In the meanwhile the estate is out of him, and all that remains to him is the mere possibility of reverter: 4 Kent, Comms., page 10. *Yet this mere possibility is capable of transmission* to his grantees, and will pass to them under a conveyance of the reversion.

"Scheets *vs.* Fitzwater, 5 Pa. 126."

We cite also:

Kirk *vs.* King, 3 Barr, 436,
Scheets *vs.* Fitzwater, 5 Barr, 126,
Vail *vs.* Fitzwater, 5 Barr, 126,
Adams *vs.* Logan County, 11 Ill., 336,

Church *vs.* Boland, 155 Mass., 171,
Church *vs.* Manning, 72 Md., 116,
Easterbrook *vs.* Tillinghast, 5 Gray, 17,
Campbell *vs.* City of Kansas, 102 Ill., 326,
Board *vs.* Edson, 18 Ohio, 226,
Gebhardt *vs.* Reeves, 76 Ill., 301.

In the case at bar the deeds are *in presenti*, the purpose and use are distinctly stated, and the conveyances are made as a free gift or donation.

And even if there has been a *consideration*:

"Although the feoffment be made for a consideration, it is the intent that guides the use, and the feoffer expressly declaring a particular estate of the use, it shows that *if he intended to part with the residue he would have declared that intention also.*"

2 Fonblanque Ch. 5, Sec. 4. (Note M.)

"The same principle applies to cases where the whole of the estate is conveyed or devised, but for *particular objects and purposes or on particular trusts.* In all of these cases, if these objects or purposes or trusts by accident or otherwise fail and do not take effect, * * * * then a resulting trust will arise for the benefit of the grantor or devisor and his heirs."

In the case of Reed *vs.* Stauffer, 56 Md., 226, the facts are as follows:

"On the 17th of November, 1808, a lot of ground in "the city of Baltimore was conveyed by deed by one "Howard, for a consideration of 100 pounds, to trustees, "in trust and to and for no other use, intent or purpose "whatever, that it should at all times thereafter be used "as a burial ground or place of deposit for the remains "of the members of the Society of German Baptists, com- "monly called Dunkards, and such other persons as a ma- "jority of the trustees residing," etc., "might think proper "to give permission to be buried therein." In 1875 a bill "in equity was filed by the heirs of the trustees for the

"sale of the lot, on the ground that it had become unsuit-
"able for burial purposes, and that it was necessary and
"would be for the interest and advantage of all the parties
"interested therein that it be sold. The Court said (p.
"253):"

"In no event have the trustees named in the deed of
"1808, their heirs and assigns, or trustees of the Church
"of the German Baptist Brethren or their successors, any
"right to have the lot in question sold and the proceeds
"of such sale distributed among themselves or their
"*cestui que* trust. The deed of 1808 in express terms
"declares the intention of the grantor, in creating the
"estate to part with the use of the property, conveyed for
"the particular purposes set forth in the deed, and for
"no other purpose, and the grantees, by their acceptance
"of that deed, are bound by that intention. The inten-
"tion of the parties to the deed is to be carried into effect
"and accomplished, unless other expressions in the deed
"positively forbid it; or unless that intention violates
"some established principle of law. By the express terms
"of the deed, it was the intention of the parties to it to
"dedicate the lot conveyed to the uses therein specially
"declared; and neither they, their heirs, the *cestui que*
"trust, nor the lot holders have any right to divert it from
"those uses. The fact that a valuable consideration was
"paid for the grant can make no difference. The estate
"conveyed and granted in express and exclusive terms,
"cannot be changed by the amount of the consideration
"paid. Where uses are declared they are to be held as
"correspondent to the consideration. Fonblanque's
"'Equity Book 11,' Sec. 4, Note M, and the authorities
"there cited. * * * * It is manifest that neither the origi-
"nal trustees named in the deed of 1808, nor their heirs,
"nor the lot holders, have any right to have the lot sold,
"and the proceeds of the sale distributed among them or
"any of them. It must be held and used in strict con-
"formity to the terms of the deed by which it was con-
"veyed, and for the uses therein specially declared.
"Should it be diverted from those uses, the terms of the
"deed, the heirs of General Howard, would immediately
"become re-invested with the title to the lot."

In the case of the First Universalist Church *vs.* Borland, 155

Mass., 171; one Clark, in 1854, for an express consideration of $900, conveyed by deed, certain land in the First Universalist Society and their assigns, or so long as the said real estate shall by said society, or its assigns, be devoted to the uses and support of those doctrines of the Christian religion embraced in the confession, etc., and when said real estate shall, by said society or its assigns, be diverted from the uses, intents and purposes aforesaid, into any other intent, uses or purposes aforesaid, then the title of said society or its assigns, in the same, shall forever cease and be forever vested in the following named persons. (Then follows a list of persons.)

> "Where there is an invalid limitation over, the general "rule is that the preceding estate is to stand unaffected "by the void limitation. The estate becomes vested in "the first taker, according to the terms upon which it "was granted or devised. * * * * The grant to the plaintiff was to have and to hold, etc. These words do not "grant an absolute fee, nor an estate on condition, but "an estate which is to continue till the happening of a "certain event, and then to cease. That event may "happen at any time, or it may never happen. Because "the estate may last forever it is a fee. Because it may "end on the happening of an event, it is what is usually "called a determinable or qualified fee. The grant was "not upon a condition subsequent, and no entry would be "necessary; but by the terms of the grant the estate was "to continue so long as the real estate should be devoted "to the specified uses, and when it could no longer be so devoted, then the estate would cease and determine by its "own limitations. * * Since the estate of the plaintiff may "determine, and since there is no valid limitations over, "it follows that there is a possibility of reverter in the "original grantor, Clark."

In Esterbrook *vs.* Tillinghast, 5 Gray (Mass.), 17, a testator devised real estate in trust to apply the income to the maintenance of a pastor or elder in the church of the town where the testator resided, of a certain faith and practice, so long as the members of that church or their successors should maintain the visibility of a church in such faith and order. Afterwards the only two members at a meeting called by public notice, voted that they should no longer endeavor to maintain the appearance of a visible church. Held, that the church was thereby dissolved and ceased to be a visi-

ble church, and that the trustee held the estate as a resulting trust, for the testator's heirs at law. The Court, by Metcalf, J., said:

> "The devise to the defendant of the property in ques-
> "tion was doubtless a devise in fee (Cleveland *vs* Hallett,
> "6 Cush., 407), and having been made to him as trustee
> "and for a specified purpose only, he holds the property,
> "since the failure of the trust by the extincion of the
> "*cestui que* trust, not for his own benefit, but for the de-
> "viser's heirs at law, and is answerable to them for it.

The Court proceeds to declare that the burial ground of this society cannot be held to be a public charitable use;

> "But the trust was restricted, in plain and unequivocal
> "terms, to the particular society to be benefitted, as well
> "as to the purpose of a burial ground, adding (as if to put
> "the matter beyond doubt), 'and for no other purpose
> "whatever.' The trust would end therefore, at the
> "latest, when the land ceased to be used as a burial ground,
> "and the society was dissolved. Easterbrook *vs.* Tilling-
> "hast, above cited; Reed *vs.* Stouffer, 56 Md., 236, 254;
> "Second Universalist Society *vs.* Dugan, 65 Md., 460;
> "*In re* Rymer (1895-7, 1 Ch., 19, 31, 32)." * * * *

> "In the case at bar the trust created by the deed having
> "been terminated according to its express provisions, by
> "the land ceasing to be used as a burial ground, and the
> "dissolution and extinction of the society for whose bene-
> "fit the grant was made, there arises, by a familiar prin-
> "ciple of equity jurisprudence, a resulting trust to the
> "grantor and his heirs, whether his conveyance was by
> "way of gift, or for valuable consideration."

In our case the purposes of the trusts are exclusive of every other than for the benefit and use of the society in the maintenance of its principles as declared by its constitutions and laws. The titles by the trustees are bound by those purposes; and if those purposes have failed, then as in the Grimshaw case, the property reverts by

way of resulting trust to all those owners of the "joint and indivisible stock," from 1836, as evidenced by membership, and the heirs and next of kin of those of them who have died as members.

REVIEW OF CASES CITED BY THE MASTER.

In considering the cases which the master has cited against our contention, it should be remembered that none are relevant which involve questions:

1st. Where the trust is for an incorporated society.

2nd. Or for an unincorporated society, having for its purposes religious, charitable, literary or scientific purposes.

For the reason that the Harmony Society is unincorporated, and not organized for any of these purposes in the legal sense. There is no pretense that the community in its purposes contemplated a *public use*. Its benefits were limited solely for those admitted to membership and who paid for such admission by a gift of all their property, and of their labor, without compensation.

The cases cited as sustaining the assertion that the grants in this cause do not constitute a base fee, are the following:

First Methodist Church *vs.* Old Columbia Public Ground Co., 103 Pa., page 608:

The covenant in that case was to convey in fee simple in trust for the sole use of the company hereafter to be formed for supplying water. The vendees covenanted that they should, upon erecting a hydrant at his own expense, have a supply of water from the reservoir for his own use. The water company was formed and the vendees released all their rights under the agreement to that company which did construct a reservoir of the size specified on the premises. The grantor or the vendor constructed a hydrant and used the water for some time, and then discontinued the use of it and subsequently died. The water company discontinued the use

of the reservoir twenty-five years after the agreement and conveyed the land to a corporation for church purposes. It was held that the estate conveyed originally was a fee simple and not a base fee.

This case is essentially different from the case at bar, as a reference to it will disclose.

Cook *vs.* Trimble, 9 Watts, 15, only decides that a condition stipulated in a deed of conveyance may be enforced by ejectment, but a consideration even amounting to a covenant on the part of the vendee cannot. Part of the consideration for the sale was a comfortable support and living to be given to the grantor, his wife and daughter.

Kerlin *vs.* Campbell, 15 Pa., 500: Under the Act of Assembly conveyance was made in trust of an old court house and lots of ground for the use of the inhabitants of the County of Delaware, to accommodate the public service of the county; an absolute conveyance was made for valuable consideration, and the trustees made and executed a declaration of trust acknowledging the purchase money to belong to the county. A subsequent Act of the Legislature authorized the Commissioners of the county to sell the premises. The same were accordingly sold and conveyed for a valuable consideration. Held that the estate granted was not a charity or a base fee, but being granted by an absolute conveyance or a valuable consideration, the heirs at law of the first grantor were not entitled to recover the same from the last grantee. The grantor had received the full consideration.

Wilkesbarre *vs.* Wyoming Historical Soc., 134 Pa. St., 616.

In this case the borough of Wilkesbarre was authorized to sell lots of ground, first conveying to the society a lot of a certain size.

In executing this statute, the borough added to the requirements of the statute, a provision or clause in the deed, for the erection of a hall for the use of said society.

The Court held that the clause for the erection of a hall imposed no condition upon the title, and that the borough had no authority to introduce such a clause into the deed.

This case, evidently, has no bearing upon any question involved in this cause.

Petition of Sellers M. E. Church, 139 Pa. St., 61.

The case decides that a

> "conveyance for a *charitable* use, does create a con-
> "ditional estate, but a trust for a *charitable* use, not li-
> "able to be defeated by non-use or alienation, in the
> "absence of an express condition to that effect."

The case turns altogether upon charitable use, and Green, J., collates the cases, p. 67.

In our case there is no such use, and therefore the case cited has no bearing.

Crawford *vs.* Gross, 140 Pa. St., 297.

The property in this case was purchased by a few members, who received certificates of stock for their advances. The property was held in trust.

The contest was between ordinary members and certificate holders. The society became incorporated, and issued new certificates. Held that those certificates were equitable or vendor's liens.

We fail to see any bearing of this case upon any question raised in the case at bar.

We can safely say that no case has been or can be cited which contravenes these propositions:

That a conveyance in fee simple of property to trustees in trust for an unincorporated association, having no limit to its contemplated life, and not formed for a religious, charitable, literary or scientific purpose, carries within its terms impliedly the provision or condition that when the trust fails, or the purpose of the society are abandoned, or the society has in any manner ceased to exist, is a grant of a qualified, determinable or base fee, and that when either of these contingencies have happened, and the trust fails, the property reverts to the donors, or their heirs and representatives.

In conclusion upon this branch of the case, we assert that the law is established in the United States Circuit Court for the Western District of Pennsylvania, by the late Justice Grier, of the United States Supreme Court, and that the same has never been reversed by this Court, to this effect:

First. That the effect of the clause of the articles of 1836, constituting the "joint and indivisible stock," was to vest in every member an equal share of all the property of the society subject to the trusts.

Second. That when the society violated its compact with any members, the contract by which those shares vested in the society was broken, and that in such event,

Third. The member affected was entitled to withdraw his share thereof, in the proportion of himself to all the other members—subject to a like proportion of debts of the society.

There is, therefore, distinct recognition of ownership as we contend for,—a right to a return of it upon the violation of the contract upon which it was given.

The case to which we refer is the case of *Joshua Nachtrieb* against the *trustees of the Harmony Society*, which originated in the Western District of Pennsylvania in the Circuit Court, and the opinion of Justice Grier referred to is reported in 3d Wallace, Jr., page 66.

Nachtrieb brought his bill against the trustees to recover his interest in the funds of the society, because of an alleged series of persecutions which had forced him out of membership. Testimony bearing upon the despotic and unjust character of the society in its government and in its purposes was also introduced. Judge Irwin, presiding in the Circuit Court, had decreed for the plaintiff, and had ordered an accounting, which resulted in exceptions, consideration of which came before Justice Grier.

We quote the following from the opinion of Justice Grier in that case:

> "The case in 2nd Binney, 441, has no resemblance to "the present. That was a corporation for benevolent "purposes where membership and not the ownership "and enjoyment of property to that of the corporator's "own use was the object. They accumulated to give "away or to spend on charitable purposes. These ac- "cumulated for themselves. They have by joint labor, "accumulated property of great value which they hold "as *joint owners. The complainant had an equal own- "ership with his 320 partners. By their contract it is to "remain joint and indivisible stock forever; but the com- "plainant has his right to enjoy it equally with his fellows.*
>
> "I know of no other measure of satisfaction or com- "pensation more just than to give the expelled and in- "jured party *his several share of their joint assets.* The "dissolution of the partnership by the wrongful act of

"the majority of the firm or association, necessarily dis-
"solves, *inter sese*, viz.: as between the expelled and re-
"maining partners, the covenants as to the indivisibility
"of their joint property. Let the decree be for the one
"three hundred and twenty-first part of the whole prop-
"erty of the society. * * * at the time of his expulsion,
"with interest from that date, deducting what the com-
"plainant has received. Decree accordingly."

No question was raised in that case as to the rights of any other persons as claimants to that fund outside of the 320 partners.

It is true this decree in this cause was reversed by this Court (19th Howard 126), but the grounds of reversal were two only:

First. The bill was not framed so as to exhibit such aspects of the internal arrangements and social and religious economy of the association.

Second. Nachtrieb was barred by a release which he had previously executed.

This Court did not express any dissent from that part of Justice Grier's opinion which we rely upon; and, therefore, we regard that opinion as establishing the law that each member since the articles of 1836, is the absolute owner of an equal share of the property of the society when the contract has been broken, and that ownership continued and is effective when by reason of the failure of the trusts from any cause, the society is unable to comply with the terms upon which the gifts were made.

It necessarily follows, under Justice Grier's decision, had Nach-

trieb died, his heirs and legal representatives would have taken his share thus ascertained.

SHIFTING USES.

The doctrine of "shifting uses" does not apply to the case at bar. Mr. Justice Gray, of this Court, in the case of Spiedel vs. the Harmony Society, 120 U. S., 377, expressly held that the trust created for the Harmony Society was for the *common benefit of the community and for the members living together in the community, subject to the regulations of the community and supported by the community.*

The citation from 2 Washburn, on Real Estate, page 669, under the title "Shifting Uses," used as an illustration by counsel for appellees, does not apply; the example in that case was a grant to unincorporated proprietors of land on which was intended to be built a church. *Habendum* to said proprietors, etc., *and to each and every person who may hereafter become lawful owner and proprietor of the pew in said house to be built thereon by said proprietors. The use would legally shift to those who would thereafter become pew holders.*

The reason why that example does not apply is that in that case there was an express grant to *members individually* who at any time thereafter became lawful owners and proprietors of pews.

In the case at bar the trust is for the community alone, and therefore is not a shifting use, but is governed by the case of Kain *vs.* Gibbony, decided by this Court in 101 U. S., Rep. 362, to which we have before referred.

In that case the bequest was upon the trust for the benefit of the community of which the testatrix might be a member at the time of her death; and she did die a member of a community known as the Sisters of St. Joseph, *which was an unincorporated association.* Mr Justice Strong, in delivering the opinion of this Court says, among other things:

"The Sisters of St. Joseph is an unincorporated association, "and it is the association as such and not the individual members "who composed it when the testatrix died which is declared to be "the beneficiaries. * * * Its members must be constantly chang- "ing, and it must always be uncertain who may be its members "at any given time. No member can ever claim any individual "benefit from the bequest, or assert that she is a *cestui que trust;* "and the community having no existence can never have standing "in Court to call the trustees to account. This bequest is there- "fore plainly invalid unless it can be supported as a charity."

VIII.

TITLE OF PLAINTIFFS.

Whatever title the ancestors of plaintiffs had since October 31, 1836, in the property of the society, by the articles of that date equalized, descended under the intestate laws of Pennsylvania to the plaintiffs in this cause.

Christian Schwartz, one of the plaintiffs, claims as the sole heir and representative of the following persons, members of the society in 1836 and signatories of the agreement of 1836, as aforesaid, and dying as such members after 1836, viz.:

Plaintiff's father died intestate, July, 1858; his mother, intestate, February 11th, 1857, leaving six children—all of whom were members, and died members (except the plaintiff) as follows, without children and intestate:

Fredericka, January 11, 1857.
Maria, May 26, 1878.
Louisa, March 29, 1889.
Joel, ————, 1858.
Joseph, June 25, 1889.

Antony Koterba claims through Andreas Koterba, who died in Economy, a member, May 25, 1880.

David Strohaker, his father died 1867, and his mother in 1875, both dying in the society; his aunt died a member in Economy in 1865.

Allen Shale and G. L. Shale claim through their grandfather, who died a member of the society in 1855, and through their uncle, who died in Economy in 1837.

IX.

The master errs in his conclusions contraverting appellant's right to maintain this bill and to the reliefs prayed for.

Those conclusions are as follows:

First. In his construction of certain provisions of the Articles of 1836, as a bar to appellants claim.

Second. In treating appellant's claims as intended to recover specific contributions of their ancestors or of themselves to the society, from the society, as an existing organization.

Third. In holding that certain decisions apply adversely to appellants' claims.

First. The master, it is submitted, errs in his construction of the provisions of the Articles of 1836, upon which he relies:

The parts referred to are as follows:

> "Second. All the property of the society, real, personal and mixed, in law or equity, and howsoever contributed or acquired shall be deemed, now and forever, "joint and indivisible stock. Each individual is to be "considered to have finally and irrevocably parted with "all his contributions, whether in land, goods, money or "labor; and the same rule shall apply to all future contributions whatever they may be.
>
> "Third. Should any individual withdraw from the "society, or depart this life, neither he, in the one case, "nor his representative in the other, shall be entitled to "demand an account of said contributions, whether in "land, goods, money or labor, or to claim anything from "the society as matter of right. But it shall be left altogether to the discretion of the superintendent to decide "whether any, and if any, what allowance shall be made "to such member, or his representatives as a donation."

(*a*) He is in error in his construction of those clauses. Each member was then parting with his right to reclaim his former contributions, and was conveying to all the members equally all the former contributions he had held in severalty, which was then converted into a "joint and indivisible stock," in which all members were henceforth to be joint owners.

The society sought to bar any future claim for the *original* contributions thus conveyed by way of covenant that such contributor should never demand an account of such *original* contributions.

Not merely had the members revoked their right and title to reclamation, but they also covenanted not to seek to defeat the revocation by making any demand in law or otherwise therefor.

With this right of reclamation gone for the past contributions and with the waiver of their right to sue for the same, all the members found themselves equal owners of all the property, which they

then and there bound by a trust for the benefit and use of the society. If the trusts were valid, their title to that stock had already gone beyond recall so long as the trust continued to validly exist.

(*b*) The provision referred to at all events, relates only to claims against the society as a *going, continuing society*; and contemplates the barring of an *individual* suit to secure a withdrawal of an *individual contribution* from the society, to which the society would be necessarily a defendant.

By no logical process of reasoning can the clause cited apply when the sole question in the cause relates to the entire *corpus* of the trust estate, lying absolutely unprotected by reason of the defeat of the trusts which had covered it, and to the person or classes to which in such event, such property should go.

Second. We have never claimed to recover specific contributions of our ancestors; or that we were members of the society at any time. The master raises false issues.

The plaintiffs do not sue to recover specific contributions; nor do they sue the society at all; they are demanding no accounting at all of specific contributions of their ancestors; they do not regard the society as living; but as defunct; its purposes defeated; its trusts inoperative and ended; and their suit, if successful, transfers the ownership of the trust estates from the last survivor to all, including those who were and are protected by the articles of 1836, as joint owners of "the joint and indivisible stock"—the subject of a trust, which is now defeated.

If in truth the trusts are defeated, the question of reversion and distribution and the rights and titles of claimants are imperatively before the Court, because no written word controls such disposition.

Certainly the last survivor cannot take, because he could so take only as a joint tenant with right of survivorship, and that tenancy we submit does not exist.

Neither can the property escheat as we have attempted to show.

And, therefore, as we have asserted, in our bill, and seek to sustain by our argument, that property must go to all who were and are joint owners, and who created the trusts by which it was dedicated to the benefit and use of the society.

Third. Let us refer to the cases cited by the master and relied upon by the appellees—always bearing in mind the real positions and claims of appellants above stated.

PRIOR CASES AGAINST THE HARMONY SOCIETY.

The master claims that the land involved in this cause, is situated in, and this Court therefore is bound by, Pennsylvania decisions, relating thereto.

There is no such cause in Pennsylvania which lays down a rule of property; and there is no statute of this State affecting any question involved in the case at bar, which has received a construction by the Courts of this State. There is therefore nothing which precludes this Court from passing upon the questions involved herein, as of the first impression.

We confidently assert that there is no such prior case, decided either in Pennsylvania or in the United States Courts, which can justly be cited against us and the positions we contend for.

We submit to the Court that no case either affecting the Harmony Society or any other similar society has been cited, which involves a recognition of the *termination of a communistic society by unlawfulness of trusts, failure of trusts, abandonment of principles, or by actual liquidation, and which seeks a general distribution of property among all entitled to distribution.*

And that the present bill, following these lines, is the only case within our knowledge where these questions are raised, and that therefore the questions now involved are not to be ruled by any of the defendant's cases.

In every one of the cases cited, the plaintiff recognized the *existence* of the society, as a going concern; did not seek to have its life declared terminated; but sought only to make the defendant pay the plaintiff either the amount he had contributed to the society, or the value of his interest in the property, or compensation for his services. Each plaintiff sought an individual recovery or an individual relief, consistent with the continued life of the society, and not one sought the appointment of a receiver, a winding up, and general distribution of property.

In many of the cases in other States, the society was either a corporation, or a religious, or charitable body, and therefore those cases are not relevant.

The first case arose in the State Court, at the suit of Peter Schreiber's administrator, and was in *account render for his share of the profits* arising under the joint transactions of the society.

It went to the Supreme Court of Pennsylvania and is reported in 5 Watts, page 351.

The action declared for an alleged partnership, and *therefore affirmed the rightfulness of the partnership.*

At that time the only existing articles were those of 1805, 1821 and 1827, and they were of necessity the only articles offered in

evidence. It is to be borne in mind that up to the date of that case and until the articles of 1836, it was the recognized feature of all the agreements that any dissatisfied member could *withdraw*, in which *event his contribution would be returned to him, in installments without interest.* The Articles of 1836 were not in existence. Those articles changed the constitution, and thenceforth there was no *right* of withdrawal recognized accompanied by restoration of property.

Peter Schreiber, in his lifetime, had executed and delivered a deed to "George Rapp and his associates," dated August 28th, 1826, of all his property, real, personal or mixed, brought by him into the society. He died in the society, *without exercising his right of withdrawal.* The intestate had also executed a *release* to the society *in the broadest terms of every suit, claim or demand against* Rapp and his associates from the beginning of the world.

There were no creditors of the decedent's estate.

No allegation of fraud or deceit was made as to the procuring of Schreiber's deed, or his release; nor that the society in its organization was *against public policy.* Judge Bredin *did* leave the question of fraud to the jury; but Chief Justice Gibson held that in so doing he committed an error—but an error of which the administrator could not complain.

And the learned Chief Justice Gibson said further that the only way the existence of the society could be attacked was that such existence was void from illegality.

The point in the case was disposed of by the Chief Justice as follows, viz.—

> "It is supposed, however, that *as the intestate had "power, by the articles, to secede from the society and to "take out of it whatever he had brought into it, the suc-"cessor to his personal rights, may exercise it as his "representative.* Such, however, are not the terms of "the articles; nor would a posthumous exercise of the "power consist with the disposition he thought fit to

"make by dying in fellowship. * * * The right of se-
"cession, therefore, is intransmissible; and were it not,
"the intestate's release would be a barr."

The next case in order of time, arose in this Court at the suit of Nachtrieb against Baker *et al.* in equity, and was decided by Judge Grier, in 1847, in the Court below. On appeal his decision was reversed by the Supreme Court of the United States, reported 19th Howard, 126.

In that case Nachtrieb asserted his right *to an accounting for his share of the assets of the society*, was confronted by his writing of withdrawal, dated June 18, 1846.

The Supreme Court of the United States, in that case expressly recognizes the right of inquiry for equitable relief, to show the

"Rule of the leader, instead of being patriarchal, was
"austere, oppressive or tyrannical; his discipline vexa-
"tious and cruel; his instructions fanatical, and, upon
"occasions, impious, his system repugnant to public or-
"der, and the domestic happiness of his members; his
"management of their revenues and estates, rapacious
"and selfish, or dishonest; and that the condition of his
"subjects was servile, ignorant and degraded, so that
"none of them were responsible for their contracts or en-
"gagements to him, from a defect of capacity and free-
"dom."

The Court further held, however, that in order to assert claims for relief: "It was a necessary prerequisite that this bill should have been so framed as to exhibit such aspects of the internal arrangements and social and religious economy of the association. This was not done; and for this cause the evidence cannot be considered."

The caused passed upon the voluntary withdrawal of Joshua Nachtrieb from the society, by a paper, which is as follows:

"To-day I have withdrawn myself from the Harmony "Society, and ceased to be a member thereof; I have also "received of George Rapp two hundred dollars, as a do- "nation, agreeably to contract." "Economy, June 18, "1846. "JOSHUA NACHTRIEB."

And that paper was held by the Supreme Court of the United States to be more than an admission, and stood in a different light from an ordinary receipt. "The writing must be treated as the contract of dissolution between the plaintiff and the society, of their mutual obligations and engagements to each other. No evidence of prior declarations or antecedent conduct is admissible to contradict or to vary it."

The character of the association is found, by this decision to be as follows:

"*The members were associated and combined* by the "common belief that the *government of the patriarchal* "*age*, united to the community *of property, adopted in* "*the days of the Apostles*, would conduce to promote "their temporal and eternal happiness. The officers of "the society *surrendered all their property* to the society "for the *common benefit*."

The Court further says, after reviewing the pleadings:

"This statement of the pleadings shows that no issue "was made in them, upon the merits of the doctrine, "social or religious, which form the basis of this asso- "ciation; nor any question in reference to the religious "instruction and administration, or the domestic econ- "omy or physical discipline which their leader and the "other managers have adopted and enforced; nor do "they suggest any inquiry into the condition of the mem- "bers, or whether they have experienced hardship, op- "pression, or undue mortification from the ambition, "avarice or fanaticism of their guides and administra- "tors."

It is therefore evident that so far as the Supreme Court of th United States is concerned, that had the pleadings shown such a issue, the Court would have considered the evidence, and if sus tained, granted relief.

The case of Spiedel *vs.* Henrici, in the Supreme Court of th United States, reported in 120 U. S., page 377, went off upon th *staleness of Spiedel's claim*, the Court saying that a Court o Equity will not assist one who has slept upon his rights, an shows no excuse for his *laches* in assorting them. The point i expressed in the syllabus as follows:

> "A bill in equity against persons holding a fun "avowedly in trust for the common benefit of the mem "bers of a voluntary association, living together as a "community, subject to its regulations, cannot, whethe "the trust is *lawful or unlawful*, be maintained by on "who has left the community, and for fifty years after "wards taken no steps to claim any interest in the fund."

Spiedel's claim was based on contributions *made under the Articles of 1805 and 1827, and before the Articles of 1836.* He left the society in 1831—while yet he had the right upon withdrawal to demand and receive the value of his contributions.—He sued as *a cestui que trust*—not as a donor of a void trust—for his specific contribution. In our case we claim nothing except in case of dissolution, and then as representatives of donors of property provided for *by the Articles of* 1836.

In this case the Supreme Court of the United States distinctly held that the trust under which the assets and property of the community was held, *was an express trust* and totally inconsistent with the trust which the plaintiff, Spiedel, set up, to-wit, tha the fund was held in trust for the benefit of the same persons, a individuals, though withdrawn from the community, living b themselves, and taking no part in its working.

It was distinctly stated that this decision does not rest in an

degree, upon the judgments of the Supreme Court of Pennsylvania, and of the Supreme Court of the United States, in favor of the trustees of the Harmony Society in suits brought against them by other members, because each of those cases differ in its facts, and especially in showing that the society had written articles of association which are not disclosed by this bill, and the Court refers to the cases of Schreiber *vs.* Rapp, 5 Watt, 351; Baker *vs.* Nachtrieb, 19, Howard, 126.

It is plain, therefore, that under the decision of the Supreme Court of the United States, the trust under which Rapp and his associates held the property in common, was *an express trust*, and second, that a bill appropriately drawn could attack the character of the trust and procure relief, unless the plaintiffs were barred, either by a release, as in the case of Baker *vs.* Nachtrieb, or by the staleness of their claim, as in the case of Spiedel.

The bill in the case at bar proceeds upon widely different lines; avers the express trust upon which the assets were held; their great value; their waste; the termination of the existence of the society, by abandonment of principles, depletion of membership, unlawful processes of liquidation of debts, and the actual winding up of its affairs through the intermediation of the Union Company—the conspiracy to wreck, the processes by which the machinery of apparent management had practically centered in Duss, who absolutely swayed and governed the ignorant old women to whom he was obliged to resort to fill up his eldership.

And the prayers *inter alia* are for a receiver, a marshalling of the assets and a winding up of the society.

THE SOCIETY NOT RECOGNIZED AS A DEFENDANT.

The decision of the Supreme Court of the United States in the Nachtrieb case, in which there is a reversal of Judge Grier's decree, limits itself expressly to the point that the bill in that case did not contain the averments to justify the admission of the evidence upon which Judge Grier had based his decree. There being no such allegations, the paper signed by Nachtrieb stood as a bar to his bill. Judge Grier had arrived at no wrong conclu-

sions from the evidence: his conclusions of law were unattacked. *But* the fact remained that both must be disregarded *because* that evidence and those conclusions could not be related to any appropriate allegation in the bill.

It follows, therefore, that the decision of Judge Grier is the unreversed law of this Court, and binding upon the master in this case in every respect, upon every question in this cause which was not considered and passed upon in that decision.

The other authorities cited by the master do not apply because they were all cases of attempts on the part of members to *either recover for services performed by them, or to get possession of property of societies which were in full life and being, and in none of them was there any allegation that the purposes of the society had been abandoned, nor was the claim to recover based on any claim of a reversionary interest consequent on an abandonment of the purposes.*

The case of Waite *vs.* Merrill, 4 Mo., 90, was an action against the society of Shakers by a member *who had withdrawn to recover the value of his services* on the ground that the agreement or covenant under which he had agreed to contribute his services and property, and released his right to reclaim any share thereof, was void as against public policy.

The Court held that the covenant between the members of the Shaker Society was not void and that the plaintiff was bound thereby, and that if it were illegal that the plaintiff could not recover on the ground of *in pari delicto potior est conditio defendendis.*

It was held further that the articles of agreement between the members were not void as against public policy.

1. *Because they did not prevent marriage,* but on the contrary marriage was *expressly* allowed; and that if there were a contract

not to marry, it was not a *perpetual one, but simply endured while membership in the society continued.*

2. That in as much as any member *could withdraw* when he *chose,* it was not void because it deprived the plaintiff of the power of acquiring and protecting and possessing property in as much as it only changed the mode in which he chose to exercise and enjoy this right or power, even though he lost his property when he withdrew.

3. That civil tribunals have no jurisdiction over questions of *ecclesiastical belief.*

In this case it will be noted that the society was in *full force and vigor,* and that the attempt was to recover on an *impled contract* for services, when an *express contract* expressly forbade such recovery and there is no question of abandonment or reverter.

The case of Brown *vs.* Dale, 9 Ch. Div. Law. Rep., page 78, is inapplicable because the contest there was, as to the right of members to *participate in the funds of the society,* who had been admitted *subsequently to a resolution dividing its property among existing members,* and there was no question *abandonment or reverter, or any claim of persons who had previously been members of the society, or their descendants.* In that case the society was a voluntary one and had no printed laws or rules regulating the disposition of the money, property or admission of members; but there had been a custom for the members of the company for the time being, or a majority at any meeting to exercise unlimited control over the management of the company's property, and that it had been the practice to admit *sons* of members as of right attaining twenty-one years, and becoming freemen of the Borough of New Castle on Tyne; and under these circumstances the Master of the Rolls held that the fund should be divided among the persons who were members of the guild at the time when the resolution dividing the property was passed. At this time there were *no persons who were members or entitled* to be admitted members other than *the plaintiff and defendant.*

The case of Grosvenor *vs.* United Society of Believers, 118 Mass., 78, was an action on a contract to *recover for services rendered* to the defendant society of Shakers from which the plaintiffs had been expelled; and here the whole question turned on the *legality of the expulsion,* the Court holding that under the covenant or articles of association the plaintiff had not an absolute right of support, but a qualified one, namely: that she was only entitled to support *"According to her needs and circumstances while standing Gospel Union and maintaining the principles of the covenants,"* and having been *rightfully expelled she could not recover.* Here there was no question of reverter or abandonment of purposes.

The case of Burt *vs.* Oneida Community *et al.,* 137 N. Y. Court of Appeals, page 346, was an action in equity brought by the plaintiff, a member of the *Oneida Communists, an unincorporated association, against the Oneida Community Limited, a domestic corporation,* and certain individuals alleged to be members of the community. The relief sought was that an alleged expulsion of plaintiff from said Oneida Community be *adjudged void, and that he be adjudged to be a member thereof; that an alleged dissolution of said community be adjudged* illegal and void; and that the Oneida Community Limited should be adjudged to hold the *property* in its possession for the plaintiff and the other members of the *Oneida Community;* that the members of the latter be adjudged *partners or owners of such property, as tenants in common* and that an accounting be had and a decree be rendered for a division and distribution of the same.

By the articles of association which were signed by plaintiff, each subscriber surrendered his individual property and it became an inseparable part of the capital of the community: it was also entitled to all the earnings of its members; each member was at liberty to withdraw at any time, but in case he did so he was not entitled to take or demand any share of the joint property. There was also a material stipulation that *no member* would *ever bring an action* or proceeding to recover wages or compensation for services or to recover any property contributed, or make any claim or demand therefor. Plaintiff had never *contributed any property,* but had contributed his services as traveling salesman. In 1880 he left and entered the service of a rival company. In

1880, after the plaintiff left the society, *nine members thereof took out a corporate charter.* The object of the corporation was to carry on a *general manufacturing and agricultural business,* including all the different kinds of business in which the community was then engaged. The capital stock was $600,000, which fairly represented the net value of its property, and since the incorporation of the Oneida Community Limited, had carried on all the different kinds of business which they had carried on first as an unincorporated association.

Among these members were those *who held the title* to the real property of the community. The property of the community was all turned over to *this corporation* and the capital stock was taken by all the members of the community, and thereafter the unincorporated association did not engage in any business nor did it undertake to discharge any of the obligations in its covenants with the members. Counsel for plaintiff contended:

1. That plaintiff was illegally expelled; that the Oneida Community being a voluntary association is to be deemed a mere partnership.

2. That the real estate was acquired and contributed by the members for the use, benefit and profit of the association or partnership while it lasted, and no valid trust could have been created by agreement of the parties so as to vest the same in the property holders as trustees for the uses of the association. The only trust was that which resulted from the acts of the parties—the resulting trust created by law.

3. That the conveyance of all the property of members of the community by the property holders to any persons except a full member, was illegal; that if the property holders were authorized to convey it to a corporation, the corporation was not capable of holding it and using it for the purposes of the Oneida Community.

4. That the conveyance of the property to the corporation was fraudulent.

The Court expressly said that it decided the *question on the ground* that this was a business compact and was a *business community*, and as such it was not prohibited by any statute, nor was it in contravention of any law regulating possession, ownership or tenure of property; that it imposed no unlawful restraint upon the alienation of property for the title of *real estate could be transferred at any time by the united action of the members* if they saw well to do.

That by the articles of association the plaintiff acquired no divisible interest in the property of the Oneida Community, but only a right to its use while he remained a member; that it was a joint holding of the property by the members of the community with this qualification, that upon the death or withdrawal of a member, no share or interest passed to him or his personal representatives, but they who survived or remained continued to hold jointly the entire property in *solidium* and that, as the plaintiff had withdrawn, his action must fall.

That whether or not the incorporation of the society and the turning over of the property of the association to such corporation amounted to a dissolution was not decided, and that if it were found as *a proposition it would not help the plaintiff because he had ceased to be a member of the community before this action was taken, and his property rights were not prejudiced by it.*

This case is distinguishable on several grounds.

1. The Court places its decision expressly on the ground that the plaintiff withdrew from the community without cause, while it was a *living organization*, and that his rights were by that act determined. There was therefore no question or no decision as to what would have been the rights of persons who died while members in the case of subsequent abandonment of the purposes of the society, or in case it had subsequently ceased to be a living organization.

2. The plaintiff in this case sued and based his sole right of

action on the fact that he was a *member of the society* and the Court found that he was not a member, and this question is therefore not passed upon.

3. A conveyance of the property of the unincorporated community to the association was joined in by every member of the community except plaintiff and the corporation carried on the same business for the same purposes as the unincorporated association, and it was a mere change in *name* and not a substantial change of ownership.

4. The Court did not pass upon the ground of *public policy*, but simply regarded the incorporated association as a *business community* and refused to go back of it, and held that it was a mere matter of contract between the parties.

5. The Court refused to pass upon the question whether the transfer of all the property to the corporation was a dissolution or not because the plaintiff could not raise the question on account of want of interest.

6. Thus, while the Court says that upon the death or withdrawal of a member no share or interest in the property passed to him or his personal representatives, the case cited by the Court sustaining this position expressly put that decision upon the ground that the association was a *living organization*, and was following out its purposes and intent and the whole case is decided on the theory that it was in *full life and existence at the time*. And in effect, the whole decision was simply a denial of the right of a member who had lawfully withdrawn to wind up a going-business partnership.

In the case of Gasleys *et al vs.* The Separatists Society of Zoar, 18 Ohio St. Rep., 144, a member of the society who had withdrawn asked for a partition of the property which was held in common, and the Court held that she had no separate or divisible interest therein which would entitle her to relief. There was no question of *abandonment* in this case. *The society* was in full

operation. It was urged in this case that there was no grantee capable in law of holding this property; and 2nd. That the articles were void as creating perpetuity. *The society was incorporated under the laws of Ohio in 1832.*

The Court, while not passing upon these questions on the ground that the plaintiff *had no interest which would enable* him to raise the question, on page 154, said that if the attempted transfer to the collective membership for the exclusive use of the society were void as creating perpetuity the property *reverts to its former owner,* but does not devolve upon incoming members subsequently, in whom it was not previously vested and who acquired no separate interest therein by the articles, still says that there is a grave question "whether the perpetual diversion of the property and its proceeds to the uses of the society, qaulified by the powers delegated to the directors and the majority of the members creates such a perpetuity as avoids the surrender." (page 156).

In this case the property was purchased by one Goesele *in his own name,* and subsequently his associates were allowed to take title upon *paying for the property by their labor, etc. Subsequently* to this, however, it was declared that the property was held in common and the members renounced all their personal interests and invested the property in the society with the declaration that the property should be and remain the property of the society forever. There was no gift *here* by any individual but simply a renunciation and a gift to the society as such. The case simply decides that where a member of such a society withdraws he is not entitled to any partition of the property, while the society *remains in existence* and fulfilling the object for which it was erected.

And the society was incorporated in 1832

In Goesele *vs.* Bimeler, 14 How., 589, it was held that the conveyance of the property of the defendant society was not void as creating a perpetuity, on the ground that the members of the society acting unitedly could *sell the* property and that in the present case the property was *absolutely* the property of *the society*

and was only managed by a *Board of Directors and was incorporated* and there was no restraint.

In our case the legal title to the property is vested in a *self-perpetuating Board of Trustees,* who have no other power than to change investments and when they sell land they are required to hold the proceeds in the same trust as they hold the land.

The master in his report quotes the grant contained in the agreements of 1805 and 1827, and thereupon avers "that this does not create a limited or base fee."

We have never alleged they did. Under both of these agreements, individual members had the right of withdrawal from membership and to receive the property contributed back upon such withdrawal without interest.

The master wholly fails to consider the Articles of 1836, upon which alone we base our contention. We repeat that the grants of 1836, do

1st. Merge all prior contributions of money, land and labor, and all future acquisitions, into one "joint and indivisible stock."

2d. That all the then subscribing members and all future subscribing members, were equally interested therein.

3d. That all acted in putting that stock, lands, moneys, goods, proceeds of labor, into the hands of trustees, by titles in fee and absolute for the benefit and use of the society.

4th. That there was impliedly and necessarily in such grants the provision that when the trust failed, the fee and absolute title

thereto should revert to those who parted with it in trust—namely the members since the making of the grants, living, and the heirs and legal representatives of members dying in the society.

5th. Because the terms of the trust provide no remainder over, makes no scheme of tontine or joint tenancy with survivorship, or any distribution whatever in the event of the failure of the trust, and that therefore necessarily the grants are limited or base fees.

This "joint and indivisible" stock comprehending all the present and future property of every description, is subjected to the trusts declared in the Articles of 1827, because the Articles of 1836 re-affirm those of 1827, except the 6th section, relating to restitution.

Therefore the trust declared in the first article of the agreement of 1827, defines its terms, from 1836 down to 1847 to wit: "As a free gift or donation for the benefit and use of the said association;" and by the agreement of 1847—article 6th—(65) the property is to be held and deemed the common property of said society, and each trustee then and thereafter appointed disclaims all personal interest therein, "other than that of a member thereof."

Prior to 1836, viz.: in 1825, Frederick Rapp, the then trustee (M. R. 142), executed his declaration of trust; and on July 5th, 1834, George Rapp, his successor, and Baker and Henrici, George Rapp's substitutes, executed their several declarations of trust (M. R. 145), fixing absolutely the titles, removed wholly from personal interest, in and for the benefit and use of the society, without remainder over.

Suppose the society dead. Where then by its terms is the property of the society to go?

In our case the estates are taken upon the trust that in the event the trusts fail or the society is dissolved by process of law or

by voluntary dissolution, or by abandonment of purposes, or from any cause, they shall go in some direction by resulting trust or to survivors, or by *escheat* to the Commonwealth. Nobody will contend that it is part of the trust, that in such events the trustees acquire a title for their own use.

LAPSE OF TIME.

The appellants have and do contend that this trust must revert on several grounds.

1. Because the society itself is non-existent, for many reasons already and hereafter to be given, and therefore the trusts, if otherwise valid, have failed.

2. Because the trusts, the society living, are void; the society itself and its principles are against public policy; the trusts violate the rule against perpetuities, and the statutes against accumulations, and for other reasons.

The master, as respects the second class of reasons, alleges that the plaintiffs are barred by lapse of time, from asserting that the trusts are void, because such as they are, they have existed for many years, and the attack upon them for these reasons, should have been made many years ago.

In other words, an admitted violator of public laws, claims in a Court of Equity that those violations shall continue because they had been continued for many years without molestation.

This proposition of the master pre-supposes that there was a moment of time when our ancestors or ourselves were judicially

fixed with knowledge and impressed with the equitable duty of action that the grants were void, because of the badness of the society's purposes, its incapacity to take and hold property, and because the grants create a perpetuity, and that that moment of time began with the creation of the society, or the creation of the trusts. And the conclusion therefore is, that a society admittedly bad, as his argument assumes and violative of public policy; a society incapable in law of taking property either directly or indirectly—a society which is the beneficiary of grants admittedly in defiance of the laws against perpetuities, may never be declared void by a Court of Equity, because such decree had never been sought for in the past. It is a *living thing only* which may plead laches or lapse of time, against one who seeks to separate for himself a portion of the property held by the living organization. A void community, an association violative of law, can have at no time a claim in equity, to continue to be regarded as not void and not violative of law, because it had for years escaped an earlier attack. Upon the hypothesis of the master's proposition, the society is a wrong doer, and because it has escaped thus far, it has acquired a legal right to escape forever.

Statutes of limitations, the statute of frauds, the doctrine of laches, and of estoppel, are all intended to *prevent* frauds, and not to *protect* and *sustain* them.

These trusts, if they are void, as the master necessarily admits they are when he urges lapse of time as a bar, never had an existence susceptible of growth; each day the exercise of them is a new birth and a new date for attack.

The master also necessarily admits that appellants have the legal and equitable right to assail these trusts because they are void, had they not been barred by lapse of time in instituting the attack. *But these trusts were just as void at the time of filing this bill as at the date of their creation, and are just as void to-day;* and the trustees are just as incompetent to maintain them to-day as at any former date. The trustees do not claim to-day, nor have they ever claimed the property of the trusts as their own, freed of the trusts; they admit they hold as trustees. As trustees they are and always have been the subjects of a Court of Equity. From the very beginning a Court of Equity has had a potential grasp of the trusts, the trustee, and of the property of the trusts. There has never been a time therefore, that such a Court has lost its juris-

diction. It is submitted that there is no case which ousts that jurisdiction by a plea that time has run against the Court. Certainly there is no case which recognizes the *right* of trustees, who admits that the trusts under which they are acting are void, and that in fact they are not trustees at all, to assert that, *nevertheless*, the trusts are to be regarded as *operative* and they are to be recognized as trustees, and protected as trustees because of the lapse of time. Trusts *ex maleficio* are raised for punishment and penalty only against the trustee in his own wrong, to hold him to a personal accountability. But he cannot claim a standing as a trustee *ex maleficio*, as if he were a trustee by right, and claim the protection of the Court to continue to be such trustee, because he had always been a trustee in his own wrong.

This question does not arise between the *cestui que trust* and a trustee for him. This is an express trust evidenced by writing, and the plaintiffs are in the class of donors and not donees.

X.

The Harmony Society Has Ceased to Exist.

The general principle is that a Court will determine that when the purposes of a voluntary association fail, or cannot be carried out in accordance with its articles of association, or constitutions, or whenever the objects of a society are impracticable, or its organization is in the nature of a fraud, the association will be declared dissolved; and further, that the question of dissolution is a matter of fact for the determination of the Court, as are also of what are the purposes and objects of the society.

Bean on Beneficial Associations, Secs. 37, 38, 39.

The master finds as matters of law:

1st. That the Harmony Society continues to exist because the present surviving members have not formally declared it to be dissolved.

If this be sound, it can be so only because the scheme of t trusts creates a joint tenancy with right of survivorship, or a syste of tontine, by which the surviving members are individually t sole owners of the trust property.

2nd. That abandonment of the purposes and principles of t society is to be evidenced only by the formal actions of *all* the mem bers as individuals.

And in this he can be right only upon the assumption of the e istence of the joint tenancy or system of tontine.

If we are right, as we think we are, in our contention tha no such tenancy was created expressly or by implication, the the Master's conclusions are erroneous, and we are left free t show to the Court, if we can, that this Court should declare th Harmony Society non-existent, by abandonment of its princip and purposes; its inability and incapacity to carry them ou and by acts of liquidation and waste. And as a consequenc that the trusts fail, and the corpus of the trust properties ar before the Court for distribution.

It will be conceded that the trusts were created solely for th purpose of maintaining and carrying out the principles and pu poses of the society. That is their sole function and reason fo living; when that reason ceases to exist, the trusts end.

Now, the purpose of the Harmony Society was to form a com munity, composed exclusively of members formally admitted, whic should recognize a patriarchal government, including communi of goods as adopted in the Apostolic days. (See Articles of 182 Record, page 221.)

The patriarch was therefore the absolute law giver and had th absolute power; the members had no voice, and by the constitutio

agreed and covenanted that they should have no voice in the patriarchal power, either by the selection or deposition of the patriarch, and no appeal from his decisions. For this we appeal to the Articles of 1805 (Record, page 218); the Articles of 1821 (Record, page 220), and the Articles of 1827 (Record, page 221).

Upon the death of the first patriarch, George Rapp, in the year 1847, a new system for the exercise of the despotic powers of the patriarchy was provided, so that they should be exercised solely by a Board of Elders therein selected, who should be self-perpetuating, and of whom two were to constitute a Board of Trustees, also named, to be filled by the self-perpetuating Board of Elders from time to time as vacancies therein should occur.

This new system was provided for by the Articles of 1847, heretofore in this argument printed at length, and which is on the Record, page 225.

An important consideration in them is that the members of the society, outside of those who composed the boards, had no voice, power, control of, or check upon the boards. Their duties were to surrender their individual properties, to give cheerful obedience to the laws and regulations of the boards, and to labor without compensation for the benefit of the society, they and those connected with them; their sole rights were to have lodging, meat and drink, medical attendance, etc. They had no power to charge or modify any trust or power, or to enlarge powers or impose new duties upon their superiors; not even to vote for the selection of members of the board.

So that the subsequent Articles of 1890, 1892 and 1894 gain no validity because they have been assented to by members; nor is the ratification of past acts or authorization for increased future powers of any force, merely by reason of the signatures, simply because of want of power to do these or any other governmental thing.

This leaves us then to consider the powers, rights and duties of the Board of Elders, and the Board of Trustees—the sole repositories of all the powers of the patriarchy.

And first: The Board of Elders had no voice or control over the trust properties, their acquisition, accumulation or accretions, the investment, management or disbursements of the property. All these were solely and absolutely within the exclusive control and dominion of the Board of Trustees, without accountability. And this constitution was the result of contracts entered into by the Articles of 1847, which have never been and cannot be changed because the rights of other non-members are involved.

Hence the Board of Elders were incompetent by later articles, if they had acted as a board (which they have not done), to control in any way the Board of Trustees, or to enlarge or diminish their powers.

We sustain these statements as to the Board of Elders by reference to the 3rd Article of 1847 (Record, page 226). The Board of Elders have these powers:

> "Article 3rd. The Board of Elders shall have and exercise the following powers, to wit: 1st. To regulate and manage exclusively the internal temporal concerns of the Harmony Society; to appoint and remove superintendents in the several departments of industry; to make regulations and give orders in relation to their business operations, and generally to take care that the members perform the duties assigned to them. 2nd. To determine all disputes and misunderstandings amongst the members of the society; to advise if necessary, reprove any member who may be in fault or found delinquent in his duty. 3rd. To admit new members into the society and to expel them therefrom. New members when admitted shall subscribe this agreement as the evidence of their membership, and of the rights acquired by, and the duties imposed upon them. 4th. To establish regulations for the maintenance and improvement of the morals of the society and for the instruction of its members. 5th. To appoint one or more of its members spiritual leaders and instructors, with such

"authority in relation to church and discipline as shall "be conferred by the board. 6th. To remove from the "Board of Elders, and declare his seat vacated, also to "remove from office either or both of the trustees herein- "after appointed for the management of the external "affairs and their successors in office. 7th. To fill all va- "cancies in the Board of Elders occasioned by the death, "resignation or removal from office of any of its members "and their successors, and so as often as a vacancy shall "occur, to fill all vacancies in the office of trustee, when "either or both of the trustees or their successors shall die, "resign his office, or be removed from the same, and so "often as a vacancy shall occur. 8th. The concurrence "of six members of the Board of Elders shall be deemed "the act of the board and a legal exercise of any of the "powers hereinbefore conferred on the said board. 9th. "A record book shall be kept in which the Board of Elders "shall enter all proceedings that they shall consider of "sufficient importance to be preserved. In all contro- "versies, judicial or otherwise, in which the society or "any of its members may be a party, such record shall be "full and absolute evidence of the facts and proceedings "therein contained, and the affirmation of any elder shall "be competent evidence of the identity of the said record."

What powers have the Board of Trustees?

"ARTICLE 4th. We do further ordain and establish a "Board of Trustees, for the exclusive management of "the external business and affairs of the society, which "board shall consist of two persons, who shall be mem- "bers of the Board of Elders, and their successors, who "shall be appointed as hereinbefore provided. Romulus "L. Baker and Jacob Henrici shall be the first Board of "Trustees.

"ARTICLE 5th. The said trustees shall jointly and "severally have and exercise the powers following, to wit: "1st. In their own names or that of either of them, or "otherwise, to purchase and sell, deal, barter, exchange

"and traffic, make all contracts and bargains in the prose-
"cution of the business, to invest the funds in stocks and
"other securities, and make transfers and assignments,
"to collect debts, receive and pay out moneys, settle
"claims, compromise disputes, institute legal proceedings,
"appoint and dismiss agents, clerks and attorneys in fact,
"and at law, and generally to transact all the external
"business affairs of the society. 2nd. To make donations
"to seceding and excluded members, and to the repre-
"sentatives of those who are deceased, and for such be-
"nevolent and charitable purposes as they may deem pru-
"dent and fit. 3rd. The said trustees shall have power
"jointly to purchase real estate in their own names and
"also in their joint names, to grant, bargain, sell and con-
"vey all or any of the lands and tenements now or here-
"after owned by, or belonging to the said society, and for
"this purpose to execute deeds of conveyance in fee sim-
"ple or otherwise in their joint names, but the proceeds
"of all such sales shall be held in trust for the society.
"4th. For the purpose of providing effectual and con-
"venient remedy in law for all injuries to the property of
"the said society, real and personal, by trespass, ouster,
"detention, conversion or otherwise, the said trustees
"are hereby invested with the rights of possession, entry
"and action in their own names, as fully and to all in-
"tents and purposes, as do and may exist in the said so-
"ciety, and to effectuate this object more completely and
"in consideration thereof, we grant and transfer to the
"said trustees, all such title and interest in the said
"property as shall be necessary therefor. The proceeds
"of all suits to be brought shall be in trust for the so-
"ciety. 5th. The powers hereby vested in the said
"trustees shall extend to and embrace all the property of
"said society, real, personal or mixed, whether stand-
"ing or held in the name of the late Frederick Rapp, the
"said George Rapp, or in any other name or form what-
"soever."

The powers, rights and duties of members are defined in the

rticles of 1827, Articles 1 and 2 (Record, page 222), incorporated nto the Articles of 1847:

"ARTICLE 1st. We do hereby solemnly recognize, re-"establish and continue the Articles of our association "(the sixth section excepted), entered into at Economy "on the 9th day of March, A. D. 1827, in the presence of "John H. Hopkins and Charles L. Voltz, and the supple-"ment thereto, adopted at the same place on the 31st "day of October, A. D. 1836, in the presence of Charles "L. Voltz and William F. Baum, except so far as the "same are affected by the death of the said George Rapp "or hereinafter altered and modified, and to this extent "we declare the said Articles to remain in full force.

"ARTICLE 2nd. We hereby ordain and establish a "Board of Elders, which shall consist of nine members of "the Harmony Society, and their successors, to be chosen "as hereinafter provided: John Stahl, John Schnable, "Adam Nachtrieb, Matthew Scholle, Joseph Hoerule, "John Eberle, Romulus L. Baker, Jacob Henrici, Jona-"thon Lenz, shall be the first board.

Hence the joining of the Board of Elders or of members or of oth in subsequent articles, has no legal effect or authority; and an only be used as an estoppel against them in any subsequent igation involving matters embraced in such subsequent articles.

Now as to the trustees: it is apparent that their powers are nited

1st. To hold the property of the society in trust;

2nd. To manage that trust property; and to change invest-nts from time to time, and to convert personalty into real es-e;

3rd. To institute suits;

4th. To make *donations* to seceding and excluded members.

By Article 6th of the papers of 1847, the trust is declared, and *inter alia* it is declared and provided.

> "And such trustee now or hereafter appointed hereby "disclaims all personal interest in the present resources "and future earnings of the society, other than that of a "member thereof, *according to the Articles of Associa-"tion hereby re-established and continued, and accord-"ing to the present agreement.*"

It is therefore evident that the trustees have no power confided to them as a board to enlarge, diminish or vary the trusts confided to them, and it is also evident that the acts hereafter specified were entirely not within the prescribed powers; nor within the powers of the Board of Elders, nor within the powers of the members, under the Articles of 1847.

XI.

THE PURPOSES AND PRINCIPLES OF THE HARMONY SOCIETY.

What then are the purposes and principles of the Harmony Society, established by its articles, for which the properties of the society have been impressed with the trust by the terms of the trust, and which the trustees have bound themselves by the terms of the trust, to use for their support and maintainance?

CELIBACY:

Celibacy, as early as 1806 or 1807 was ordained by the patriarch under his power to *make laws and regulations.*

The answers admit the "practice" of celibacy since the date mentioned, but deny that the observance of it was *essential to membership.* By the Articles of 1805, no terms of membership are mentioned. Admissions were at the will of the patriarch. It

is also true that many married persons had been admitted, but it is also true that they ceased to cohabit as man and wife after admission.

It is also true that several children were born to members, but it does not appear that such children had been born of intercourse after their parents became members.

To the contrary, every case of retirement from membership figuring in the law cases had its origin in a desire to marry. The rule or law was rigidly enforced, and no marriage was permitted in the society.

In the Nachtrieb case (tried in the Circuit Court below and hereafter more fully considered) Justice Irwin found as an *admitted fact that marriage* and *the sexual intercourse of married persons* were *prohibited* in the society.

COMMUNITY OF GOODS.

Community of goods was recognized as an underlying principle from 1805. The contributions were absolute for the use of the community, reserving the right of restoration in the event of withdrawals.

Community of persons and goods logically demand celibacy as its foundation principle. Otherwise the laws of inheritance would prevent; there would be the inequalities arising from the prolific increase of some and the comparative barrenness of others. Family ties and the consequences arising therefrom would prove speedily destructive of the society.

So celibacy and the non-intercourse of married members constitute purposes of the community, in addition to the other features above noted.

The preamble to the Articles of 1827 (52) fully express the objects and purposes of the society:

> "Whereas, By the favor of Divine Providence, an as-
> "sociation, or community, has been formed by George
> "Rapp and many others, *upon the basis of Christian*
> "*Fellowship*, the principles of which being faithfully
> "derived from the *sacred Scriptures*, include the *gov-*
> "*ernment of the Patriarchal age, united to the com-*
> "*munity of property adopted in the days of the Apostles*,
> "and wherein the single object sought is to approxi-
> "mate, so far as human imperfection may allow, *to the*
> "*fulfillment of the will of God*, by the exercises of those
> "affections, and the practice of those virtues which are
> "essential to the happiness of man in time and through-
> "out eternity."

Thus we have the fundamental principles of the Harmony Society as follows:

1. *Christian fellowship*, including the government of the *patriarchal age, united* to the *community of property adopted* in the days of *the apostles*.

2. The approximation as a single object of the society to the fulfillments of the Will of God by the exercise of affections and practice of those virtues essential to the happiness of man here and hereafter.

3. And the adjudicated cases establish as another doctrine the belief in the Second Advent of Christ, and the nearness of the millennium.

The master finds that celebacy was *not one of the purposes of* the society and was not requisite for admission to membership, but had been practiced since 1807.

He is not sustained by a single competent witness; he is confronted by the admissions of the answers of the continuing custom from the earliest days of the society; also by the power to make and enforce rules and regulations; also by the logical necessity of communism. The adjudicated cases connected with the Economy Society recognize celibacy as a fundamental principle of the Harmony Society. In the Nachtrieb case the depositions of record declared, in the Court below, made by the members in 1847, celibacy as an established principle.

"Community of goods," as adopted in the days of the Apostiles, implied numbers.

At the ascension of our Saviour the number of disciples was about one hundred and twenty (Acts, ch. 1, verse 15). And on the day of Pentecost there were added unto them about three thousand souls. (Acts 11 ch., verse 41).

The definition of a "Community," as given by Webster in the latest edition, is as follows:

> "A *body of people* having common rights, privileges "or interests, or living in the same place, under the same "laws and regulations, as a community of monks."

A "community" is distinct from the idea of family; the word necessarily implies the voluntary association of those who are under no family relation, but who are united in a common scheme of living, acting and government.

> "'Communism' is defined to be 'the re-organization "of society, or the doctrine that it shall be re-organized "by regulating property, industries and the sources of "livelihood, and also the domestic relations and social "morals of mankind. Socialism is especially the doc- "trine of a community of property, or the regulation of

"individual rights and property."—*Sanford's Cyclopedia of Religious Knowledge.*

"Community of goods, the holding of goods, in com-
"mon, implying common ownership and common use
"and enjoyment, but not in law, the right of partition or
"severance."—*Century.*

"Communism, in its ordinary signification, is a system
"or form of common life, in which the right of private
"or *family property* is abolished by law, mutual consent,
"or vow. To this community of goods may be added
"the disappearance of *family life.*"—*Woolsey, "Communism and Socialism,"* page 1.

XII.

THE HARMONY SOCIETY HAS CEASED TO EXIST.

The career of John S. Duss, the present sole trustee, is remarkable. Without previous membership, without contributing any means whatever to the already vast properties of the society, he became on the same day, January 24, 1890, both a member of the society and a member of the Board of Elders.

On July 28, 1890, he became Junior Trustee; Jacob Henrici, the Senior Trustee, being an octogenarian, and in feeble physical condition.

On the death of Father Henrici, which occurred on December 25, 1892, Duss became Senior Trustee. In a short time thereafter, the new Junior Trustee sold out, and then Duss became both Senior and Junior Trustee, and we believe he has adopted the title of "Patriarch."

He was thirty years of age at the time of his admission.

In less than three years he had acquired absolute control of all the trust properties of the society, as technical trustee and dominant governor and controller of the persons constituting the membership, the policy and affairs of the society. There was no one to say him "nay."

This young man, then, accountable to no person, has as exclusive control of this vast estate as any private man could have, short of the legal title in himself. *His expenditures for members is limited to the food, lodging and clothing of a few old people, whose lives had not led them to be dissatisfied with plain living.*

The expectation of being the last surviving member was a reasonable one. The belief at that time was general that the grants to trustees of the properties created a joint-tenancy in the members with right of survivorship; that whoever did so survive, would take them all as his own, cleared of the trusts.

The motive to so survive was natural, and necessarily dominant. We confidently say that not an act has been done since Duss became an elder, which he could control, that did not tend to the accomplishment of that survivorship, and the acquisition of the property to himself.

The situation is admirably described by Irwin, J., in his opinion filed in the Circuit Court below, in the case of Nachtrieb against the society:

"Unless human nature should be proof against the strong "temptation to hasten such results, the dissolving element "would be always at work. The unwritten rules of the "society inconsistent with natural rights and liberties as "seen beyond its own limits, the death of the members, "the expulsion of others, with or without cause, and the pro-"hibition of marriage and the lawful intercouse of the married, "would in time so reduce the community in numbers, as to "make it expedient and proper in the opinion of the survivors to "dissolve and divide the possessions."

Since Duss became the sole expression of power, the sole trustee, he has destroyed the society.

Communism of Property. He has potentially all the property, less the cost of maintaining five or six old people, of peasant extraction, laborers in their working lives, and with plain tastes, easily and economically gratified.

The foundation principle of celibacy is discarded. He lives with his wife and his family, in the Great House at Economy.

He has abolished the Community. For a community implies numbers. The very code of government of 1847, is based on a *governing body on the one part*, and *people to be governed on the other.* Every available living member, females except himself, will not fill the Board of Elders, and there are none others upon whom the government is to be exercised. There are only eight members living, including Duss and his wife.

He has admitted no new members since 1893.

He has purchased the proprietary interests of seventeen able bodied and comparatively youthful men—whose ages were menaces to him, for an average sum of $5,000 each, and has in violation of his trust, perverted the trust funds in his control to pay them. These purchases were acts of liquidation, of partition—a setting apart to the vendors of their shares of the whole estate as appraised by them and by Duss, leaving to himself the residue enhanced by his cheap bargains, for his private share.

He has conveyed every foot of land of the community, every house, buildings, mills, shops, vineyards, farm land, oil and gas wells, and even the bones of the dead members, as they repose in the graveyard, to a capitalistic corporation of Pennsylvania known as the Union Company, and taken in exchange for it its capital

stock—so that the society as such has neither property of the trust, nor the form of government provided by its constitution.

At this period of liquidation, when the appellants claim that Mr. Duss was winding the society up, he effected life insurance of one hundred thousand ($100,000) dollars, in favor of his individual estate and in favor of his children, who were not members; said premiums being paid out of the trust funds in his hands. Not until proof of this was made in this case did he cause such insurance to be charged in favor of the society, and such change was made in consequence of that proof. This act can be defended only upon the theory that Mr. Duss considered the society's affairs liquidated and wound up, and he entitled to the sole possession of the trust assets.

In no one sense, nor in any view, does the Harmony Society exist within the limitations of purposes and principles and the mode and form of government prescribed by its constitution.

We submit the case discloses that not one of those principles or purposes survive.

Numbers form an *essential* feature of a community, and of this community, so the Articles of 1821 provided for the admission of *new members*. The Articles of 1847 confer power on the elders to admit new members, and that power involved a duty.

Not one new member has been admitted since 1893. Duss has purchased at prices averaging five thousand dollars for each, the interests of seventeen members, all of whom except one were healthy and vigorous, and none exceeded a moderate middle age. Their possibility of life was almost as good as that of Duss and his wife. That depletion has never been made good.

It is a significant fact that from 1893 down to the date of the filing of this bill in 1894, and, until this day, Duss has not admitted one new member to the society—thus absolutely and surely dooming the society to extinction.

It is the utmost insincerity to urge, as counsel for appellees has heretofore advanced, and as the master has assented, that new mem-

bership could not be obtained. A joint ownership in four millions of property, a home and maintenance for life in the society, together with the right of withdrawal at any time, possess such attractions as would result in a waiting list beyond parallel. And yet not merely a single member has been admitted, nor has any effort been made by Duss to secure an application for membership.

To-day the surviving members are J. S. Duss, Senior Trustee, and Junior Trustee, who joined the society in 1890.

Susie C. Duss—age 38, joined in 1890.
Karoline Molt—age 54, joined 1887.
Barbara Boesch—age 80.
Katrina Nagel—aged 58, joined 1887.
Franz Gillman—age 77, joined 1887.
Mrs. Hermansdoerfer—age 47, joined 1890.
Christina Rall, 77 years of age.

Except Duss no men remain in the alleged society save Franz Gillman—a German aged 77 years, who joined the society in 1880. He can neither read nor speak English, though in this country for nearly 30 years.

Since 1893 seventeen of the most active, intelligent and worthy members of the society were bought off by Mr. Duss, accepting money and real estate ranging from $4,000 upward, and since 1890 eighteen members have died, while on the other hand, since Mr. Duss became Junior and afterwards Senior Trustee, *not a single new member has been admitted, but one,* with the result that *he and the decrepit Gillman alone remain as the male* members of a society once having an active membership of *several hundred;* which formerly filled the large town of Economy with its hundreds of houses and many streets. Now the remnant will scarcely fill the rooms in the Great House.

Members selling while Duss was Senior Trustee.		Members dying since 1890.
Hugo Miller, March 8, 1893....	$5,000	John Worth,
Bertha Geratch, Mar. 29, 1893.	3,600	——— Kirschbaum,
Julius Stickel, March 29, 1893..		John Lenz,
Paulina Stickel, Mar. 29, 1893.		E. Woelfel,
[Personal property in addition.]		
Jacob Nicklaus, May 5, 1893....	5,000	M. Staib,
*Henry Feucht, May 16, 1893 . .	5,600	H. Fischern,
Margaret Feucht, May 16, 1893.	5,600	J. Henrici,
Benj. Feucht, May 16, 1893....	5,600	G. Lauppe,
Rebecca Feucht, May 16, 1893..	5,600	J. Scheib,
Tirza Feucht, May 16, 1893....	5,600	E. Beck,
Sig. Stiefvater, May 17, 1893...	5,000	D. Hoerer,
M. J. Fredericks, June 5, 1893..	5,000	S. Wolfangel,
B. Platz, June 9, 1893.....	5,000	C. Hermansdoerfer,
Christina Hoerer, June 23, 1893	5,000	M. Diem,
Leonhard Hoerer, June 23, 1893.		P. L. Wolfangel,
Eliza Sieber, June 29, 1893.....	4,000	R. Lautenschlager,
Samuel Sieber, July 6, 1893....	1,000	G. Riethmueller,
		E. Kellerman,
		Fredericka Muntz.

*[In addition to about $30,000 of real estate.]

This society is recognized as a "community" in the Articles of 1805; of 1821; of 1827; of 1836. It is styled an "association" in those of 1847; of 1890, 1892 and 1894.

Is it not farcical to call these eight surviving persons—acting as a depleted Board of Elders and a Board of Trustees, with no membership to govern or control—in number not exceeding an average family—to call these a "community"—an "association," a "society"?

No Power of Formal Dissolution.

The most careful scrutiny of the articles, constitution or agreements of the Harmony Society, will fail to disclose any power in the membership, or in the trustees as trustees, or as officers, or in the Board of Elders, to voluntarily formally dissolve the Harmony Society. The members are mere recipients during life, of certain provisions for their support and maintenance; they have no vot-

ing power, no right to demand an accounting; no voice in the dispositions of the income, or control over the same in any manner, nor in the selection of elders or trustees. As compared with the perpetual life of the society as contemplated, the members are transients only; the death of a member has no effect upon the society in any manner. They, then, have no power to dissolve the society of their own motion.

The trustees so far as they hold the property in trust, have no power given them to terminate the life of the society, or alter or vary the terms of the trust, or to divert the trust funds.

Neither are the Board of Elders or the Board of Trustees, as managers, superintendents, or general agents, vested with any power of dissolution. Their powers are expressly restricted to the preservation, management and control of a *living* society; they *maintain*, they have no granted power or right to *destroy*.

The position of the master that a dissolution must be by consent of *all* the members, or an abandonment of principles by *all* the members, is not sound, because it concedes a power not granted to them; and because it concedes a title to the trust property in them, in violation of the terms of the trust created for the society.

The trusts are expressly limited to "the benefit and use" of the *society*, and not of its members.

Dissolution of the society is, therefore, something which may be *encountered*. The state of facts which have terminated the life of the society may have been the result of wrongful acts of the patriarchy, or even of the members; a perversion of the property, the impairment of the joint and indivisible stock, the willful permission of immoral conduct, surrender of the prescribed form of government, absolute inability to accomplish the purposes and principles for which the society was founded, and of many other conditions of affairs.

When the *facts* which have caused this dissolution, do occur, here remain then only liquidation and distribution of the prop-rty. But neither the trustees nor the Board of Elders are given ny power of liquidation or distribution. If they do so act, it is ıot because they are acting in the pursuance of the duties of their ffice as prescribed by the articles, but they do so as *trustees in heir own wrong*. Their sole duty, then, is to seek judicial au-ıority, especially because the rights of *all* interested in the joint nd indivisible stock *vested* at the moment of dissolution.

Our position we respectfully submit, is unassailable, if it be onceded, as it has been by the Court below, that the grants in rust do not create a joint tenancy with right of survivorship in he members, as members. Because when the society dies, it no ɔnger can support the trusts, and the property must revert by ʏay of resulting trust to those who are equally interested in the joint and indivisible stock," which is the *corpus* of the trust; ıose who are living, and the heirs and legal representatives of ıose who are dead. And they not *as* members, but because hav-ıg been and being members, they were the donors of the prop-rty to the trust.

Not merely is the position of the master unwarranted by the ticles of the society, but it might result in John S. Duss, as sole rvivor, wandering on the face of the earth, in two capacities, ıe as an unincorporated association—the sole beneficiary of a ust, of which he is the sole trustee; and the other as an ordi-ry individual citizen. As a society, *he* does not die; his trust operty cannot be taken to pay his individual debts. According the master, the law would be quite unable to mix Duss as a *ciety*, with Duss as an *individual*, because, he reasons, the so-ty is legal, the trusts created violate no law, and nobody can that the society is dissolved, unless all the members *consent*. ıd Duss may not consent!

s it possible that the master can be sustained in his other po-on, that there is no dissolution or abandonment of principles ess *all* have abandoned these principles? If so, the Board of lers and the trustees may convert the town into a free-love so-

ciety, and permit conduct violative of all decency and sobriety, diametrically opposed to every principle and purpose recognized by the articles, and still survive as a society, if all have not participated in the formal decision of abandonment.

The society is a "shadow, not a substantial thing"! Utterly bereft of virility, with no membership; absolutely incapable of performing any of the obligations of a patriarchal communistic society, is it to be said that the mere garment which garbs the skeleton is the society of the constitution, the beneficiary of the trust, because of its own motion the skeleton has not discarded its robes?

Having shown that the articles constituting the constitutions of the Harmony Society do not vest in the members as members, or the Board of Trustees, or in the Board of Elders, or in the combination of all, any power voluntarily to formally dissolve the association, can there be any question of the power or jurisdiction of a Court of Equity to ascertain whether acts have been committed, or whether acts have been permitted which in point of fact are contrary to the purposes and principles of the society and which necessarily, therefore, create a condition of dissolution?

It is unnecessary for us to quite authorities to establish the jurisdiction of this Court over an unincorporated association. It is conceded by the master and is conceded by the Court below.

XIII.

PARTITIONS OF TRUST PROPERTIES.

In pursuing his scheme to become vested by survivorship with all this vast property, Duss had to deal with two classes of members, viz.:

Those whose ages and infirmities gave probable indication of speedy removal by death;

Those whose comparative youth and robustness of health affected materially his chances of surviving them.

In the former class are the present living persons:

Christina, Rall, aged 77 years,
Barbara Boesch, aged 80 years,
Franz Gillman, aged 70 years,
Katrina Nagel, aged 58 years,
Karoline Molt, aged 54 years,
Mrs. Hermansdoerfer, aged 47 years.

Some of these may be dead already; the record does not disclose it.

These can be maintained at very slight expense for the remainder of their lives.

Those composing the second class could be got rid of only by purchase. Accordingly a form of conveyance was prepared, which was used substantially in every case of purchase, except in the case of Hugo Miller, and negotiations were entered upon.

These deeds are printed in the Record, pp. 232 to 246, and are numbered Exhibit No. 1 to 12½, inclusive.

These forms all contain substantially the following:

"And in full knowledge of the fact that said society "owns in addition to the property at Economy and "Leetsdale, several thousand acres of land in Michigan "and in Warren, Pa.; also certain tracts of land in Al- "legheny County, Pa.; also stocks and bonds in various "railroads, mining, manufacturing and bridge compan- "ies, to *nominal amount of several hundred thousand* "*dollars;* also various judgments, mortgages and unsold

"lots in Beaver Falls and New Brighton, of the nomi-
"nal value of several hundred thousand dollars; also
"that while it may be possible that the said society may
"have a large amount of property after payment of its
"debts, I am entirely satisfied to *accept as my full share*
"*and interest therein* said (five thousand) dollars, *and I*
"*will never hereafter make any claim for any sum what-*
"*ever, nor for the delivery of any other property of said*
"*society to me, no matter what may be the value of the*
"*property and assets of said society after payment of its*
"*debts.*" * * * * *

Not merely this, but the deeds of the Feuchts and the Stickels —some eight signers (Exhibit 10, p. 961; Exhibit 12½, p. 965)—*fix the probable surplus after payment of debts as follows*: "And that said society may have property worth *several hundred thousand dollars left after the payment of its debts and liabilities.*

The master continually speaks of these transactions as *withdrawal of members.* He is certainly not justified therein by any proper construction of the terms of these deeds.

The transactions were virtually a setting aside of the shares of each of the selling members in the entire property of the trusts. Thus the assets are specifically mentioned, viz.:

Economy Lands.
Leetsdale Lands.
Michigan Lands.
Warren Co. Lands.
Allegheny Co. Lands.
Stocks, Bonds, several hundred thousand dollars.
Judgments, Mortgages.
Unsold Lots, several hundred thousand dollars.

The equities of these after paying debts, may be, it is said, a large amount; in two the equity is fixed at several hundred thousand dollars.

Having thus before them the property in which they are interested, the selling members fix each the value of his own interest, generally $5,000, and then each agrees to accept the sum named:

"As my full share and interest therein."

Is there not here a clear and definite admission that *all* the members held *all* the trust properties in common; an agreement that each of the selling members should withdraw the value of his interest from the trust properties, upon an agreed valuation of that interest?

The value of these interests being paid out of the trust funds, the remaining properties represent only the shares of those members who remain—the remaining portion of the trust fund equals the shares of the remaining members, who elect, however, not to sever their interests then, but to continue to hold their shares in common.

These transactions, then, constitute a *dissolution* of the society, and a liquidation of the interests of all the members, subject to the payment of debts. Assuming there were twenty-six members, each had one twenty-sixth; seventeen severally estimated the value of his 1-26th at $5,000, which was forthwith allotted to him. The remaining nine have the rest of the property for their several 1-26ths, and choose for the present not to sever their interests, but to continue those nine interests in common.

This liquidation was not the *individual* act of Duss, apparently, but the official acts of the Board of Elders. The transactions appear on the minutes.

There can be no question that these transactions were, and were intended to be a winding up of the society.

And it is as equally as clear an admission that the trusts have failed; that the society has ceased to exist; and that the time had come in the estimation of Duss, to take the property into individual possession—paying those who could probably interfere with

him, their shares, and take to himself all the residue, subject only to the very slight burden of supporting six old and infirm people —most of whom are in the shadow of the valley of death.

John S. Duss in his answer (par. 29, p. 45) says he came in December, 1891, in respect to the financial conditions of the society to know that its reputed great wealth was a myth, *and such wealth as it did possess in its then condition was more than equalled by its enormous load of indebtedness.*

He further says that in pursuance of the provisions of the articles of government, wherein it is provided that the trustees shall have and exercise the right to make donations to seceding members as they may deem prudent, "we did *donate* and pay Hugo Miller $5,000; Samuel Sieber $1,000; Jacob Nicklaus $5,000; Blazsius Platz $5,000, and Moritz J. Frederick $5,000."

He further says (pp. 95, 96) that in the exercise of the rights of trustees to make *donations* he paid to the Feucht family $28,000 in cash, $15,150 in lumber and land. He similarly dealt with the Stickels, with Stiefvater, Mrs. Hoerer and her son.

This pretense of a *"donation"* is absurd. A donation is a free gift; the transactions now referred to were purchases for large resulting considerations.

An example of "donation" is Exhibits Nos. 8 and 9 (Record, p. 240). Lena Fritch having on February 14, 1890, resigned her membership, received $95 "to pay my traveling expenses and such like." (Exhibit No. 8.) Father Henrici and Duss (Exhibit 9) also lent her $24 to go to Germany, which she is to return in case her circumstances make it possible.

At this time, October 23, 1890, Duss had no knowledge that the financial condition was bad—he fixes that date December 1, 1891—and yet with all possible indicia of great wealth all around him, he fixes the *donation* at $95.

In 1893, when, as he says and as he *swears*, he knew that the society's wealth was a *myth*—that its wealth was more than equalled by its debts—he buys the interests of these 17 persons at an aggregate of over $85,000, borrows the money on mortgage and swears that the transactions were "donations."

These selling members were admitted to membership and made their sales as follows, viz.:

	Date of Admission.	Date of Sale.
Benj. Feucht, Henry and 3 ladies of that family	Feb. 13, 1890	May 16, 1893
Stickel, wife and Miss Geratch	Feb. 13, 1890	March 29, 1893
Hugo Miller	Feb. 13, 1890	March 8, 1892
Blazsius Platz	Feb. 13, 1890	June 9, 1893
S. Stiefvater	Feb. 13, 1890	May 17, 1893
Samuel Sieber	———, 1892	July 6, 1893
Mrs. Sieber	———, 1892	June 29, 1893
Leonard Hoerer	Mar. 14, 1893	June 23, 1893
Mrs. C. Hoerer	———, 1892	June 23, 1893
Jacob Nicklaus	Jan. 20, 1890	May 5, 1893
M. Fredericks	———, 1889	June 5, 1893

These alleged *"donations"* were made to sixteen persons admited as late as February, 1890. One person, Leonard Hoerer, admitted March 14, 1893, was *"donated"* out within three months.

XIV.

THE UNION COMPANY.

Not only as we have clearly shown has the society, or Duss and the remaining members, abandoned every principle, law and regulation, which constituted the reason of the formation and existence of the society, and for the maintenance of which the financial system was derived and established, but they have

turned over the society and its affairs to a corporation of the second class under the corporation laws of Pennsylvania, authorized to purchase and to sell land.

The duties and the trusts imposed upon and accepted by the Board of Trustees and the Board of Elders, and defined by the Articles of 1847, and a reference to them in this place will be appropriate.

In the preamble, it is narrated, that George Rapp had died thus depriving the members of his Christian fellowship and religious ministry, and his superintendence in their temporal affairs, and that therefore, it has become necessary to the good order and well being of the association that some plan should be agreed upon to regulate its future affairs, promote the general welfare and *preserve and maintain it upon its original basis.*

And therefore, the two boards were constituted. The Articles of 1827 (containing the exposition of principles) and the supplemental Articles of 1836 are solemnly recognized, re-established and continued.

The machinery of the two boards was devised solely to take George Rapp's place, for the purpose of preserving and maintaining the society upon its original basis, and the principles and purposes of the society as shown in the two agreements referred to, and the laws and regulations which Rapp by those articles had authority to enact and enforce.

The duties of the two boards were of a *personal* nature, and could not be delegated.

Thus the Board of Elders had power to remove and appoint superintendents; to take care that members performed the duties assigned to them; to determine all disputes and misunderstand-

ings; to advise; to reprove; to admit new members; to expel, to regulate, maintain and improve the morals of the society; to instruct; to appoint spiritual leaders; to remove members from the board; vacate seats; remove trustees; to fill all vacancies in either board; to choose successors.

The Board of Trustees were to deal, purchase, sue, contract, bargain, and generally to transact all external business.

And all the property is to be deemed *common property* of the society.

The Union Company was incorporated under the provisions of the XVI. section of the Corporation Laws of Pennsylvania, approved the 29th of April, 1874 (Purdon's Digest 406), which provides for the incorporation of

"XVI. Associations for the purchase and sale of Real Estate, "or for holding, leasing and selling real estate * * *."

The capital of such companies is limited to $600,000. (Sec. 35); their Board of Directors and officers are elected by stockholders, and are accountable to the State for taxes, &c.; its stockholders are liable in certain contingencies for certain classes of debts; it may be dissolved by process of Court, and its affairs wound up by judicial decree. Its stock is always subordinated to its debts or losses in the prosecution of its business. The corporation has neither a soul of its own to save, nor has it corporate power to care for the souls of others. It has none of the powers confided by the Articles of 1847 to the Board of Elders and the Board of Trustees. It is not within its power to feed, lodge, maintain and support in health and sickness, nor care for the religious welfare of the members of the Harmony Society, nor perform any of the other duties imposed upon the two boards of the society.

The capital stock of this Company is $400,000. On April 12th, 1894, the trustees, Duss and Riethmueller, conveyed to the Union Company all the lands of the society at Economy, at Beaver

Falls, in Allegheny County; in short, all its real estate everywhere, except land in Ohio, and a few lots at Beaver Falls valued at about $4,000 (Master .)

All of the capital stock was given as consideration to the trustees, viz.: $400,000.

"A shareholder in a corporation has no distinct or individual title to the *moneys* of a corporation; the shares represent a right to participate in profits only."

Bidwell *vs.* Railway Co., 114 Pa., 541.

The trustees have divested themselves of titles in fee, by which they controlled the *corpus*, by sale to a corporation, receiving in return shares which give them no distinct title to the moneys of a corporation, but gives them only the right to participate in profits which such corporation may make, if profits be made.

At any rate by these conveyances, the trustees have divested themselves of every foot of their real estate; the members have not a roof over their heads. As Duss says they are tenants at will of the Union Company.

This transaction is not merely a direct act of liquidation; it is in flat defiance and violation of the trusts imposed upon these trustees.

The articles (Exhibit "H," page 247) confesses the liquidation and assigns the insolvency of the society as its cause, as follows:

1st. This present suit was threatened, to recover large sums of money alleged to be due to heirs of deceased members, which the paper declares they believe to be unfounded.

Of course, this is a confession of a fraudulent conveyance in-

tended to defeat any recovery by such heirs, if they should be held entitled in such suit.

2nd. It had become necessary for the society to obtain money to pay its debts, either by borrowing and giving security, or by selling the lands of the society and thereby get cash for the payment of said indebtedness.

This concedes debts beyond the *income* of the society; the necessity for depleting its "joint and indivisible stock," and it also admits that the transaction was to be a transaction of *sale*.

3rd. That the lands can be better managed and made more available for collateral purposes; more satisfactory titles can be given if first conveyed to an incorporated company; and *also avoid inconvenience and trouble that may arise from time to time by change of trustees.*

4th. Therefore, authority given to "forthwith *sell, transfer and convey* to the *Union Company*, all its lands in Beaver and Allegheny Counties."

This sale comprises all its Pennsylvania lands.

Duss assigns other reasons in his testimony, viz.:—to avoid an *escheat;* as to the property of the society "*out of sight out of mind,*" and therefore the transaction was a good one.

They pretend also that this corporation is a substitute for the Harmony Society; in short that the Harmony Society is now the Union Company. Whether so intended or not, the sale of the

Union Company tends to hinder, delay and defraud any creditor of the Harmony Society who may procure judgment against it.

Not an industry is carried on in Economy by the society since this sale, no matter what the master says. Every house, mill, shop, field, oil well and gas well is owned by the Union Company; and all are occupied, when occupied, and operated by tenants, be they at will or otherwise, and by lessees of the Union Company.

John S. Duss, as president of the Union Company, is in possession of the lands and tenements of the company, conveyed to it by John S. Duss, trustee, in flat violation of his trust, and in liquidation of debts and for other fraudulent purposes. As such president he doubtless receives a salary for services, which as trustee he could not lawfully exact. He has by this act absolutely blotted out the Board of Elders, and deprived them of their right to the exclusive management of internal affairs of the society, and he has blotted out his own trusteeship; and he as president of a corporation for profit and a Board of Directors composed almost exclusively of non-members of the society, have exclusive ownership and control of all the trust property.

Franz Gillman is the only male member of the society, beside Duss, and Gillman is an imbecile, so that the directory is necessarily composed of non-members, except as to Duss.

The Board of Trustees have no power of liquidation conferred upon them by the Articles of 1847. The power of liquidation—the conversion of trust property for paying debts is never implied as existing in a trustee, or a Board of Directors. When a company can no longer pay its debts as they mature, the company is insolvent; the directors cease to be directors, and hold the assets in a new relation, until the process of law is put into operation. The Board of Trustees are entrusted to *manage and preserve the corpus* of the property of the company, to sell, to buy, but not to *deplete* the property in their character of trustees. If their operations prove disastrous, their powers as trustees cease and they

bear a new relation—and that only to put into operation an official process of liquidation.

It will be contended that in as much as the Articles of 1847 give power to the trustees to sell all or any part of the property of the company, they had the power to *sell all* the property to the Union Company.

In this there is error. All the property granted by those articles were for a "going" concern, and for the purpose of keeping it going; to carry into successful results the principles of the society, and to maintain in existence and in the exercise of their functions the Board of Elders and the Board of Trustees. It is an astonishing proposition that the articles which create a system and prescribes powers to keep that system in successful operation may be construed to justify a *destruction* of that system, and a complete demolition of its two boards, and of the duties imposed upon them.

Besides, a power of sale, no matter how large, will never be construed to include the sale of all the property necessary for existence, and a conversion into an entirely hostile and distinct enterprise.

The law bearing upon this question is the same law applicable to Boards of Directors of corporations.

Morriwetz on Private Corporations (Sec. 239) says:

> "A Board of Directors have no implied authority to "make a material and permanent alteration of the *busi-*"*ness or constitution* of a corporation, even though the "alteration be within the company's chartered powers."

And (Sec. 240) that the directors of a corporation have no im-

plied *authority to wind up the company,* or to sell any property which is necessary to carry on its business.

The trustees have not the power or authority to *change the business, the mode of government, or the machinery already adopted* to maintain and carry out the principles of the society; and in so doing they have destroyed the society, and terminated its existence.

It is also contended that every living member of the society signed Exhibit "H," dated April 11th, 1894, authorizing this sale to the Union Company, and that in so doing they made lawful the transaction of sale to the Union Company, and *that being the sole surviving members they had full power so to do.*

This contention necessarily assumes:

1st. That the constitutions of the society provided for a joint tenancy with a right of survivorship; or

2nd. That if there was no survivorship provided by the constitutions, the society itself remaining a society in April 11th, 1894, had a right to so deplete the property, or change its character, and destroy its system, and to substitute foreign and alien modes, motives and systems, so that when the society really died, the changed conditions of property would be substituted in distribution among all those entitled, next of kin of members dying in the society since 1836, included.

As to the first assumption that the surviving members of 1894 could do what they pleased as sole owners by survivorship, we can add nothing to what we have heretofore presented, viz.: That none of the articles contemplated the *death of the society* in any form, or made any provision for tontine;—and that neither can be presumed in the absence of express provision; and that, there-

fore, there is no survivorship or tontine. If we are correct in this the first assumption falls.

As to the second assumption, that independently of right by survivorship, the society still existed *as a society*, and that during its existence, it has power to fundamentally change the purposes and systems, and to convert the property of a society *founded for distinctly expressed purposes into stockholders* of a real estate corporation, the best answer we can make is to state it.

In this view, the membership are as much bound to maintain the principles, preserve the property, and be governed by the systems of 1847 as the trustees are. They cannot validly authorize the trustees to violate their trust; for all the rights of the living members are comprised in *enjoyment and use*, and in the preservation of the corpus for distribution among those the law directs, when the time for distribution comes.

The members under the Articles of 1847 had no right to *change* anything. Nothing was reserved to them. They had no power to vote, no power to change the boards, to enlarge, to reduce their powers, to authorize them to do this, or forbid them to do that other. The Board of Elders was *self-perpetuating*, and the Board of Trustees was dependent for life on the Board of Elders. The members were only mere serfs, to work cheerfully with their hands as the boards directed. And in Signing the Articles of 1847, they forever obliterated themselves from any semblance of right or power to change trustees or elders, to authorize the trustees to do or not to do; to enlarge powers; to reduce powers; to ratify. And if the agreement of 1894 is to be read as though it was the resolution of the Board of Elders or Trustees, it is affected with the same vice—a vital lack of power to modify, change or alter the Articles of 1847, or to enlarge, reduce or destroy the trusts therein provided for.

The appellees must therefore absolutely depend on the Articles

of 1847 for the power of the trustees to sell these lands to the Union Company. When we look at these articles or any preceding articles, to find what rights or powers the members as such have reserved to themselves, we will find nothing. They are emasculated; they have deprived themselves of every vestige of power or authority or right except to *labor and labor cheerfully and to obey cheerfully, and to waive wages, and accept only board, lodging and clothing, care in sickness, etc.*

Such powers cannot exist in the members as such, without destroying the articles, and establishing some other system which perhaps ought to be, but is not.

In short the system is an abhorrent one—a system of slavery intolerable in a free land, and should be mercilessly condemned.

But there these articles are, and it is impossible to import into them any authority in the members as such; to give different direction to the powers of the trustees, from that provided by the Articles of 1847, unless the appellees can succeed in convincing the Court, that the constitutions provide for a joint tenancy with right of survivorship, or tontineism in the members.

If it be seriously contended that death of a member in the society leaves no descendible interest to his heirs or next of kin in the property of the society, the interest of each member therein is reduced to a life tenure only. When one dies he simply steps out, and the remaining members continue such life interests until they die.

And then, that being the case, a life tenant, or one whose interest in the property is but for life, cannot by *his act* interfere with the disposition of the fee held by trustees for the society as a whole. And hence all the members signing the Articles of 1894, having only *life enjoyment* cannot by a *united act* control the uses, dispositions and purposes covered by the trusts, so as to divert them from the conditions imposed upon them; especially

to the prejudice of those who have legal rights in distribution protected by the agreements of 1836, and the trusts of 1847.

The master contends that the transaction of sale to the Union Company, was not entered into with intent to liquidate or to dissolve the society thereby, and as the members and trustee did not *form an* intention to dissolve thereby, the society is not dissolved, notwithstanding that sale.

The question of intention has nothing to do with the condition; an actual dissolution is a necessary consequence of acts done, and cannot be defeated because the actor did not intend that consequence.

A man is presumed to intend the natural consequences of his act; those natural consequences prove the intent.

The master certainly can find nothing in Exhibit "H" (the Articles of 1894) to support his conclusion that there was no intent to dissolve. The fact that the trustees resorted to the *members* for an authority, shows an intent to resort to the original elements, consistent only with a radical change destructive of the society. Then the confession of insolvency contained therein also. And these articles of the 11th of April, 1894, are immediately followed by a deed dated April 12th, 1894, to the Union Company—the day after.

The company had been already organized; the deeds had already been prepared, and the very next day the corporation stepped in, and the Board of Elders and the Board of Trustees stepped down and out.

The Union Company is the practical liquidator of the affairs of the Harmony Society to-day.

We give a summary of Exhibit "H" (Record, p. 247), dated April 11, 1894:

They recite a large indebtedness, payment of part of which may be called at any day; that this suit is threatened; and therefore it becomes necessary in order to obtain money to pay debts, "either to borrow money and give security," or sell the lands of the society, *and thereby obtain cash for the payment of said indebtedness;* that the lands can be better managed and made more available as collateral and more satisfactory titles given, if first conveyed to an incorporated company, *to be thereafter managed, sold, disposed of, by and in the name of such company.*

> "And also avoiding thereby inconvenience and trouble
> "that may arise from time to time by change of trustees
> "by death or otherwise."

Therefore sale authorized to the Union Company of

> "All lands now owned and held by said trustees for
> "the benefit of the said society to the end that all said
> "lands, tenements and hereditaments may be owned,
> "held and managed by said incorporated company, and
> "be sold and otherwise disposed of from time to time in
> "pursuance of proper corporate action as *may be de-*
> *"termined by the directors and officers of said incor-*
> *"porated company."*

The capital stock of said incorporated company, however, to be owned and held by the trustees in accordance with the articles of association to the amount of $397,500 out of a total capital of $400,000.

What else can this be but liquidation and death?

The trustees get certificates of stock, which may or may not be dividend paying. The profits, the money, the corpus belong to the incorporated company, not to the *trustees.* The latter have deposed themselves, and have delegated their trust to the officers

and directors of the incorporated company, every one of whom, except Duss, is a stranger to the society.

The trust fund is burdened with State dues and taxes; the corporation is subject to State control, and over and above all, the corporation has no corporate right to act as manager or trustee for any other persons.

In the most optimistic way this transaction can be considered, how are the members of the society to be housed, fed, clothed, and nourished in sickness and age, out of dividends on stock not earned nor declared?

Duss, trustee, is Duss, president of the corporation; he at least is strictly in it.

The property conveyed to the Union Company is worth at the very lowest figure $4,000,000. The consideration given to the trustees is $395,000 in stock. Who is to control the enormous profit of the corporation—who, but Duss? Where comes in the control of the Board of Elders? And who are the elders, except one imbecile man, and ignorant, incompetent, non-English speaking old German peasant women.

The preamble, reciting the indebtedness and the necessity for raising cash, is a mere blind, a pretense, and is not founded on fact. This paper "H" was signed April 11, 1894.

The master finds that $1,002,731.62—every dollar of the liability to the bank, had been paid off January 1, 1894, four months before the date of this Exhibit "H." (Record, page 129, M. R.) The trustees got not one dollar or cent from the Union Company. On the contrary the master finds that the trustees actually loaned to the Union Company $119,740.43 (M. R., Record, p. 134). The trustees had also unsold bonds and stocks to the amount of $352,-

000 (Record, p. 134), together with this domain, and the trustees had but a short time before paid $86,870.42 to selling members for their interests in the society (Record, p. 134).

And where would the Union Company get any money to pay the trustees? All its capital was exhausted and gone to the trustee, Duss—and therefore it had no means left. The very money loaned by Duss, $119,000, was applied to paying the second mortgage and $50,000 on the first mortgage. These mortgages were assumed by the Union Company as its own debt without a dollar in its treasury to meet them. Of the first mortgage $350,000 remains unpaid—a first lien, and the title to all the equity rests in the Union Company.

The master seems to hold that the Union Company is the Harmony Society. How can this be within the charter of the Union Company?

If he be right, then the Harmony Society cannot be living. The duties of the Board of Elders and the trustees have vested in an extraneous corporate Board of Directors. That board consists of five persons. The Board of Elders is nine. The discretion and power of dealing with the property of the trust has passed from the trustees of the society to the Board of Directors. What contract has, or what contract can the Union Company assume to support and maintain the members, or to fulfill the obligations imposed upon the Board of Elders and the Board of Trustees?

We submit with confidence these propositions:

That the transaction of sale to the Union Company was in violation of the trusts, was an abandonment of the purposes of the society, and an act of liquidation consequent upon an actual dissolution. The assent of members in paper "H" was an express acknowledgement of dissolution.

That if the Union Company be the Harmony Society in another name, the form of government provided by the act of 1847 is destroyed; the Union Company in so acting is also acting *ultra vires.*

That if the master be right in so regarding the status of the Union Company, then the trustees have made a voluntary assignment to the Union Company, and the Union Company is the voluntary assignee to convert the property of the society by sales, to pay the mortgage debts, furnish money for payment of other debts, and to account to the trustees for the surplus remaining. The testimony shows that no rents are charged by the Union Company to the trustees, the later being, as Duss terms it, tenants at will. And the Union Company gave the trustees leases of all the Economy lands, &c., from April, 1894, to April, 1895, without rent, the trustees to pay the taxes.

And the assignment is made to a company with no power to so act. The transaction however is a recognition of the failure of the trusts and of the society, and is the declaration of an abandonment of the purposes and principles of the association.

XV.

Even if he held that the society has not yet terminated its existence, as we think we have clearly shown, yet the trusts are void in themselves, for the following reasons:

SOCIETY AGAINST PUBLIC POLICY.

The society having its existence for the maintenance of these principles and purposes, is *obnoxious to the policy of the law;* and a trust to support and maintain them, *is for that reason void;* and the property held therefore passes by way of resulting trust to the classes hereinbefore specified.

In the first place, the jurisdiction of the patriarchy extends to municipal control, in a manner vitally different from and antagonistic to the constitutional system of the State respecting communities. Thus, the exercise of the franchise; of the right of naturalization; of participation in national, State and local affairs, and of the right of a voice in the periodical election of municipal officers—indeed, all civil rights is taken away from the individual and is vested in the patriarch. All individual rights are merged into the community.

As there can be no *individual* wealth, there can be no individual contracting; nor can there be any executionary response for individual liabilities. All the private property which might result from individual labor is vested in the community, and the member is left for protection to the will of the patriarch.

The most solemn obligations of civil duty of the individual is controlled by the will and regulation of the patriarch.

The scheme involves a system of labor which, if successfully carried out, involves a disastrous competition against free labor; for the member is to work without payment, beyond his lodging, board and maintenance. Its effect, if practiced to the full extent, is as disastrous to free labor as negro slavery proved to be.

The members are concreted into an individual designated as a "Community," and hence they are not equal before the law; nor are they free, nor does their situation at all bring them within the declarations which are the foundations of the government.

As the constitutions of the society make no provisions for a termination of its life, it follows that if the scheme should for long periods prove successful, the society would absorb to itself vast amounts of money withdrawn from the community at large, and held as for a perpetual life, thus exempting itself from the common lot of individuals in the event of death, by way of distribution among those entitled; a defeat of collateral inheritance taxes, and all the other duties and successions and obligations of the ordinary citizen.

The inevitable result of the scheme is the aggrandizement of those in power, and the debasement of the membership in ordinary.

Judge Grier, in the Nachtrieb case hereinbefore referred to, describes the system as an
"isolated condition of a community, whose moral and intellectual "energies are studiously kept in a state of torpor and inertness; with "undefined social rights, and an administrative power limited by no "written rules, and with matrimonial restrictions contrary to the "policy of the law."

A community of persons, isolated and differentiated in all the functions of civil life, is against the policy of the law; the doctrine and practice of celibacy and non-intercourse of married persons are against the policy of the law; community of goods is socialistic and antagonistic to the system of distribution of estates and is against the policy of the law.

At the time of the inception of this association the laws of Pennsylvania did not recognize the purposes and principles which underlie its existence as proper to be enfranchised with corporate powers.

When the system of incorporation was extended by the corpora-

tion laws of 1864 to almost every form of association, the Legislature did not deem it proper to extend its franchise to such a corporation.

And so, also, the corporation laws of 1874, broad and full as they are, provide no clause or paragraph under which such an association could claim corporate privileges and franchises.

Fancy an application for a charter to the Legislature for this association, asking corporate powers to establish a patriarchal municipality with community of property, a membership of serfs bound to lifelong labor without recompense, except as to bare existence, and barred from rebellion by forfeiture of the proceeds of that labor; withdrawing estates from recognized political control, forbidding matrimony, defeating the laws of inheritance; for a society for perpetual accumulations in itself as an entity; a power of making laws and regulations; a tying-up of property forever, and an absolute taking away of the individuation of its members!

Can it be, then, in these circumstances that individuals can, by their own volition, establish a community with all the attributes of corporate power for such purposes, and successfully maintain that courts shall recognize the monstrosity thus conceived and born?

Under the constitutions, or whatever the agreements may be called, the individual members had no assignable shares of stock; they are mere incidents; they live, they die, the society goes on. It concentrates in itself the unlimited wealth which individual contributions and individual labor pour into its coffers, so that it may well be, should the scheme be continuously successful, and should the society have the perpetual life contemplated, its numbers would be overflowing, its wealth enormous, its members, deprived of matrimony, would cease to add to the population of the State; its enslaved labor be a successful competitor of paid labor, and its membership an assemblage of monks and nuns.

And for the foregoing and many kindred reasons, which need not be elaborated, the trust, however validly constituted itself, must

be defeated because of the badness of the purposes for the benefit, support and maintenance of which it was created.

XVI.

THE SOCIETY NOT COMPETENT TO HOLD PROPERTY.

Conceding for the sake of the argument that the principles, purposes and scheme of government of the Harmony Society are not against public policy, and that they are unobjectionable in themselves, yet we contend:

First. That the Harmony Society is an unincorporated association; that it is an organization neither for a religious, charitable, literary or scientific purpose, and therefore it is incapable of holding property in its own name.

Second. That a trust created for its benefit and use is invalid.

Even if it be held that the Harmony Society can validly hold property in its own name, or through trustees for its use and benefit we contend:

That the trusts for this society violate the rule against perpetuities and are therefore void.

If it should be held that the rule against perpetuities has not been so violated we then contend:

First. That the grants are in the nature of base or conditional fees, reverting to the donors and their heirs upon the failure of the purposes of the trust by way of resulting trust.

Second. That the society has come to an end and no longer lives, and therefore the properties covered by the trust reverts to the donors, or their heirs or legal representatives.

THE MASTER'S POSITIONS ARE:

1st. It is conceded that the society is an unincorporated association;

2nd. But that the trusts, while they are for the "benefit and use of the community," do not designate any particular purpose to which the property may be devoted;

3rd. That the property may be held indefinitely, but if of advantage to the society, it may be sold;

4th. And therefore the trusts do not violate the rule against perpetuities;

5th. That notwithstanding its want of incorporation the socity may be *cestui que* trust of personal property;

6th. That while it cannot take title to real property in its society name, property may be held for its use and benefit by trustees and its right to the enjoyment of property be secured in that way;

7th. That the trusts do not constitute an estate upon a condition subsequent, or a base fee, because the words in the conveyance do not of themselves create a condition, nor are so connected with the grant as to qualify or restrain it.

As we have said, it is conceded that the Harmony Society is an unincorporated association.

It is also conceded that the terms of the trust are absolute; the uses of the property are not limited to any religious, charitable, literary or scientific purpose.

The only limitation expressed in the terms of the trust is *"for the use and benefit of the society."* That, of course, means for the maintenance, support and continuance of a community organized for the purposes set out in the constitutions.

None of these purposes come within the class of purposes which are defined by the law to render an unincorporated association capable of holding property through trustees. They are neither religious, charitable, literary or scientific purposes.

Neither do any of the conveyances denote that the property held in trust is to be donated to a religious, charitable, literary or scientific purpose.

In the case of Kain *vs.* Gibboney, 101 United States Rep., 362, Strong, J., delivering the opinion, says in discussing the will in that case:

> "A 'charity' is generally defined as a 'gift for a public "use.' Such is its legal meaning, and here the bene- "ficial interest is given to a religious community."

In the case at bar, the purposes of the Harmony Society are defined once and forever, since by the Articles of 1827, and those purposes are:

> "WHEREAS, By the favor of Divine Providence, an as- "sociation or community has been formed by George Rapp "and many others, upon the basis of Christian fellowship, "the principles of which being faithfully derived from "the sacred Scriptures, include the government of the "patriarchal age, united to the community of property, "adopted in the days of the apostles, and wherein the "single object sought is to approximate, so far as human "imperfection may allow, the fulfillment of the law of "God, by the exercises of those affections and the practice "of those virtues which are essential to the happiness of "man in time and throughout eternity."

Then follow the mode of government, the gift of lands, tenements, goods, chattels, money or debts due, belonging to the mem-

ber, in possession, or in remainder, or in reversion, or in expectancy as a free gift or donation *"for the benefit and use of the said association or community."*

The community is simply communistic, where the members, distinguished from the patriarch, or patriarchy, are serfs; trading their labor for a bare maintenance, by virtue of a covenant which could never be enforced against the community as an entity; where the sole power is vested in the government over body, raiment, lodging, food, by-laws and regulations not defined nor limited by any fundamental limitation—and includes the power of expulsion.

It is invariably held that an unincorporateed association is incapable of taking by gift or grant.

Town of Paulet *vs.* Clark, 9 Cranch, 292.
Vidal *vs.* Girard, 2 Howard, 127.
Ingles *vs.* Trustees of Snug Harbor, 3 Peters, 144.
Ould *vs.* Washington Hospital, 95 U. S., 303.

The gifts or grants in the case at bar contained no direction for a future incorporation, and therefore is not saved by the case of Ingles *vs.* Trustees of Snug Harbor (3 Peters, 144), in which case the devise was to trustees to erect a hospital, and directed the trustees to apply to the Legislature for an act of incorporation, which was done. The Court held the devise good, because of that, and distinguishes the case of the Baptist Association *vs.* Hart's Executors (4 Wheaton, 27), on that ground.

In the case just cited from Wheaton, the Court held: "That the association not being incorporated at the testator's decease could could not take this as a society."

In the Girard will case (2 Howard, 127), the Court said:

> "The donees were an unincorporated association, which "had no legal capacity to take and hold the donation in "succession for the purpose of the trust."

A *grant to trustees* for a mere voluntary association is void.

Hornbeck, *vs.* Westbrook, 9 Johnson, 73.
Jackson *vs.* Cory, 8 Johnson, 385.
Sloan *vs.* McConahey, 4 Ohio, 157.
German Association *vs.* Scholler, 10 Minn., 331.
Thomas *vs.* Marshfield, 10 Pickering, 364.
Sanderson *vs.* White, 18 Pickering, 328.

This doctrine applies with full force where the gift is wholly of personal estate.

Norice *vs.* Bishop of Durham, 10 Vesey (1805).
1 Ames on Trusts, 214.

We submit that under the authorities cited, the trusts sought to be created are void, and that the property reverts to all who were within ownership and entitled as inheritors of those members who have died in the society since 1836.

The master cites (p. 187) several authorities, which, it is claimed, sustain his positions, that

> "Although a voluntary, unincorporated association "cannot take title to real property in their society name, "as they are not in law recognized as persons, it may "be held for their use and benefit by trustees, and their "right to the enjoyment of the property be secured in that "way."

It will be found upon examination, that not one of them deals with an unincorporated association, having no religious, charitable, literary or scientific purpose. And therefore do not apply to the case at bar.

And in this view it is sustained by authority:

The case of Kain *vs.* Gibbony, 101 U. S., 362, cited by the defendant's counsel, held void a gift by will to "Richard V. Wheelan, Bishop of Wheeling, or to his successor in said dignity, upon a trust that in the event the testatrix should afterwards become a member of any of the religious communities attached to the Roman Catholic Church, and remain so at the time of her death, the said Wheelan, Bishop, and his successor in said dignity was constituted a trustee for the benefit of the community of which the testatrix might be a member. The said property or money to be expended by the said trustee for the use and benefit of said community." The testatrix became a member of the community known as the Sisters of St. Joseph which was unincorporated.

Justice Strong held, among other things, as follows:

> "That is an *unincorporated association,* and it is the "association as such and not the individual members who "composed it when the testatrix died, which is declared "to be the beneficiary. * * * * Its members must be con- "stantly changing, and it must always be uncertain who "may be its members at any given time. No member "can assert claim on individual benefits from the bequest, "or assert that she is a *cestui que* trust; and the com- "munity having no *legal* existence, can never have stand- "*ing in Court to call a trustee to account.* This bequest "is, therefore, plainly invalid unless it can be supported "as a charity, and it is far from evident that it is a gift of "charitable uses. It looks more like private bounty. "Charity is generally defined as a gift for a public use. "Such is its legal meaning, and here the beneficial inter- "est is given to a religious community, but not declared to "be for religious uses. There is nothing in the will to "show that aid to the poor or aid to learning, or aid to "religious or to any humane object was intended."

A most important and an analagous case is the case of Martha Hopkins *et al.*, appellants, *vs.* William H. Grimshaw, decided by the Supreme Court of the United States, at 165 U. S. R., 342, which arose upon a Bill in Equity by all the heirs of Stepheny Forest, and by Horace S. Cummings, trustee, against another heir, and Wil-

liam H. Grimshaw to enforce a resulting trust in, and to obtain partition of land conveyed by Forest and Redden and others to trustees for the Union Beneficial Society of Washington for a burial ground.

The society was unincorporated under written articles prescribing its purposes.

The land was used for many years for burial purposes.

All the trustees named as grantees being dead, Grimshaw obtained conveyance from Mrs. Forest and her daughter; Mrs. Brooks, her mother-in-law; from Wells, president of the society, and from the heirs of the grantee trustees.

Grimshaw then procured from the Board of Health leave to exhume the bodies, which he did.

The Supreme Court of the District of Columbia dismissed the bill without prejudice to the rights of the plaintiffs to claim such right, if any, as Stepheny Forest may have been entitled to in the real estate, as a member of the society.

The Supreme Court of the United States, Mr. Justice Gray delivering the opinion, held:

> "The first inquiry which naturally arises is whether the "deed was for a charitable use in the legal sense. If it "was, the conveyance would not be open to any legal ob- "jection by reason of the length of time during which "the trust might last, or because the society named not "being a corporation. Ould *vs.* Washington Hospital, 95 U. S., 303, Russell *vs.* Allen, 107 U. S., 163, 171. "And the trustees, although the deed did not in terms "run to their heirs and assigns, would take the legal es- "tate. Russell *vs.* Allen, above cited; Potter *vs.* Couch, "141 U. S., 296, 309; Easterbrook *vs.* Tillinghast, 5 "Gray, 17, 21."

The Court proceeds to declare that the burial ground of this society cannot be held to be a public charitable use:

> "But the trust was restricted, in plain and unequivocal "terms, to the particular society to be benefited, as well "as to the purpose of a burial ground, adding (as if to put "the matter beyond doubt), 'and for no other purpose "whatever.' The trust would end, therefore, at the latest, "when the land ceased to be used as a burial ground, and "the society was dissolved. Easterbrook *vs.* Tillinghast, "above cited; Reed *vs.* Stouffer, 56 Md., 236, 254; Second

"Universalist Society *vs.* Dugan, 65 Md., 460; *In re* "Rymer (1895-7, 1 Ch., 19, 31, 32). * * *

"In the case at bar the trust created by the deed hav-"ing been terminated according to its express provisions, "by the land ceasing to be used as a burial ground, and "the dissolution and extinction of the society for whose "benefit the grant was made, there arises, by a familiar "principle of equity jurisprudence, a resulting trust to "the grantor and his heirs, whether his conveyance was "by way of gift, or for valuable consideration."

In our case the purposes of the trusts are exclusive of every other than for the benefit and use of the society in the maintenance of its principles as declared by its constitutions and laws. The titles held by the trustees are bound by those purposes; and if those purposes have failed, then as in the Grimshaw case, the property reverts by way of resulting trust to all those owners of the "joint and indivisible stock," from 1836, as evidenced by membership, and the heirs and next of kin of those of them who have died as members.

XVII.

THE GRANTS CREATE A PERPETUITY.

It is also evident—without again quoting the articles themselves—that the community has no fixed period of life. So far as the articles are concerned, the scheme of the society contemplates *perpetual* life. Its death, winding up, insolvency, dissolution from any cause, are never thought of, and are never mentioned or provided for.

The trusts created are to endure perpetually coincident with the perpetual life of the society; the titles vested are therefore conclusively for a period beyond a life or lives in being and twenty-one years thereafter, and thus they do offend against the rule against the perpetuities.

The master's contention is that as the gifts were absolute, there was the power of sale in the trustees, and that therefore there was no perpetuity. But the argument overlooks the vital fact that

the proceeds of such sales are to be held upon the same trusts as were the properties sold. The power of sale is not given to *terminate*, but to continue and benefit the community.

It is not the *power* of *sale*, but *the period of distribution*, which decides whether a perpetuity has been created. The suspension of the power to alienate the subject of a trust is not relieved against by a power to exchange for other property to be held on the same trust, or to sell it and reinvest the proceeds to be held on the same trust.

The only power of sale is given by Article 5th of the Articles of August 12th, 1847 (Exhibit "E," page 61), and is part of the powers given to the Board of Trustees in the management of the affairs of the society.

The next article (6th) expressly declares:

> "That all the property, real, personal and mixed, which "*now or hereafter* shall be held or acquired by any trus- "tee or trustees, or persons under them, is and shall be "deemed the common property of said society," * * * * "according to the articles of association re-established and "continued, and according to the present agreement."

If the master be right, a sale of trust property defeats the trust and the proceeds of the sale are not bound by the trust, and the express provisions of the Articles of 1847 are nullified.

Again the master finds—and is therein sustained by the Court below—that the trusts created are not trusts for the *members* of the society, *but for the society itself as a society*. Therefore, members may be admitted; they may die; they may be expelled; yet the society goes on, and the trusts are undisturbed.

We urge that the trusts for this society are unprotected by incorporation, by any of the purposes which protect an unincorporated association; that they are not based on an anticipated corporation, and that, therefore, the grant being in fee, the accretions cumula-

tive, without limit, the trusts violate the rule against perpetuties, and are void.

That the properties, real and personal, covered thereby, therefore, revert by way of resulting trust to the donors, their heirs or legal representatives.

The third paragraph of Article 5th of the agreement of August 12th, 1847 (Record, page 224), authorizes the trustees to purchase and sell real estate, and to sell all of the lands now or hereafter belonging to the society, but expressly provides "that the proceeds of all such sales *shall be held in trust for the society.*

It is apparent that if the society continues to live, as it has already for so many years, the trust of the titles, or the proceeds, will continue to live in the name of its trustees. Even if the real estate were sold, the proceeds of that real estate remains land, and is to be treated as land.

So far as the personal property, the *profits* and accretions therefrom and from the labor of members are concerned, it becomes part of the capital of the community, necessarily, because there are no stockholders among whom they could be divided. Hence those accumulations are perpetual, and are in violation of the statute regulating accumulations.

We earnestly urge upon the Court that the property held by these trustees, under the necessary construction of the articles, is a trust for the society as long as it remains a society, and upon its death that it shall revert to the donors, their heirs and legal representatives.

That the particular estate or use for the society cannot be broken or defeated by the society, for it has no control under the articles over the titles, which are inflexibly fixed in the trustees; first, for the society; second, when the society ceases to be a society, then for the donors as aforesaid.

The society is the beneficiary for its life only. It has no immediate right to become the present absolute owner of the trust properties.

> "A perfect definition of a perpetuity has not been given, "and the nearest approach to it is found in Lewis on Per- "petuities, Ch., 12, where it is said to be a future limi- "tation, whether executory or by way of remainder; and "of real or personal property; which is not to vest till "after the expiration of, or which will not necessarily vest "within the period prescribed by law for the creation of "future estates, and which is not destructible by the "person for the time being entitled to the property subject "to the future limitation, except with the concurrence of "the person interested in the contingent event."
>
> Hillard *vs.* Miller, 10th Barr, 334.

If it is conceded that the trust estate may continue for more than a life now in being and twenty-one years; and if it be conceded, as we think it must, that the Harmony Society had no power to convert its interests into an absolute estate, than the definition prevails, and we have here estates void for perpetuity.

In Niefflin's Appeal, 121, Pa. State, 205, the life tenant had a power of sale in fee simple in her lifetime, by which she could convert her limited estate into an absolute estate. It was held *that that power* defeated the rule against perpetuities. She did convey and she had the right to apply the purchase money as she saw fit.

Hare, J., in the Court below, C. P. No. 4, Philadelphia, so holding, says, among other things:

> "If this inference is just, she had an immediate right "to become the present absolute owner * * * * she could "undeniably have vested an absolute interest in the buyer, "and so push the property beyond the scope of a rule which "only applies where the holder's estate is indestructible.

"*A power to sell, and re-invest the purchase money for "the same uses would stand on a different footing.*" * * *

The decree of the lower Court was affirmed. Justice Green in that opinion, cites the following from Gray's Work on Perpetuities, Section 526:

"And if a man who has a vested limited interest in "property has the *present unconditional* right to turn that "limited interest into an absolute interest, and thus to "acquire the *present unconditional* absolute interest, he "is regarded by the rule against perpetuities as already "having such interest. * * * *

"*There must be a person with a vested limited interest "who has the immediate right to become the present ab-"solute owner.*"

Where, then will be found any immediate right in the Harmony Society to become the present absolute owner?

And where can be found in the trustee any power to absolve the proceeds of the trust real estate from the trust for the life of the society?

It is held *In Re* Walkerly's Est., 41 Pacific Rep., cited in American Digest for 1896, page 772, and 108 Cal., 627, cited in American Digest, page 4249, paragraph 3, that "though a devise in trust allows the trustee *to sell the property at any time, still it being provided that the trustees shall hold and invest the proceeds until distribution, which is not to be made until a definite time*, the perpetuity is created under the Civil Code, Sec. 771, which declares that the suspension of all power to alienate the subject of a trust *other than power to exchange it for other property to be held on the same trust, or to sell it and re-invest the proceeds*, to be held on the same trust, is a suspension of the power of alienation, within the inhibition of Sec. 715.

It is submitted that such is the common law rule, namely, that where there is a trust created or a restraint of alienation which would bring the trust within the rule against perpetuity, *that the*

mere power to sell and change investments, the proceeds to be held upon the same trust, does not take it out of the inhibition of the statute.

It was contended below by the learned counsel for the defendants that under the Articles of 1847, the trustees have power to sell all the property the title to which they hold in trust—and that, therefore, these articles, as the others, are no restraint upon alienation, and do not create a perpetuity. Yet if the trustees do sell, it is only for the purpose of exchange, and the substituted property is to be held by them on the same trusts.

And so it is that all the property, original or substituted is for trusts which may continue forever, and the corpus is to be never diverted from the trust, so far as the articles provide.

And this society is unincorporated, and is for neither a religious, charitable, literary or scientific purpose.

In the case of Barnes *vs.* Barnes, 26 Maryland, 171, 172, the devise was in trust for children and their heirs. The Court held that no question is presented as to the future vesting of an executory estate, in order to determine the validity of the preceding one; but *simply* whether the trusts of the will require in their execution a longer period than that prescribed by the rule against perpetuities, and therefore render the property devised to the trustees inalienable during that time. If so, the law denounces the devise in trust as a perpetuity and declares it void.

And the devise was held to violate the rule.

It seems a weak and insufficient distinction to say that the power to sell particular properties by a trustee, in aid of the trust, avoids the rule, when the corpus of the whole remains to uphold and maintain a trust for a period of time which the rule prohibits.

Neither, in the event of this trust being held violative of the rule, would the trustees hold the title cleared of the trusts.

In the case at bar, the society itself in 1836, held the property; as donors declared that the property should be held by the society; constituted themselves as donees of the joint and indivisible stock; the titles are held by agents, managers or trustees, and were so taken permeated with the trusts so created. The case differs radically from those wherein the donor is a stranger, creating a trust for a third party, between whom there was and could be no privity.

ACCUMULATION.

It is unnecessary to do more than to refer again to the trusts declared for the use and benefit of the society to establish the fact that they provide a system of accumulation, which become part of the corpus of the estate, so that the rents, issues, interests or profits thereof shall be wholly accumulated for a longer term than a life or lives in being, and the term of twenty-one years thereafter, in express violation of the Statutes of Pennsylvania, dated April 18, 1853, Sec. 9, pl. 503; Purdon's Digest, page 1833, pl. 9, which is in these words:

> "9. No person or persons shall, after the passing of "this Act, by any deed, will or otherwise (*i*), settle or "dispose of any real or personal property, so and in such "manner that the rents, issues, interests or profits there- "of shall be wholly or partially accumulated, for any "longer term than the life or lives of any such grantor or "grantors, settler or settlers, or testator, and the term "of twenty-one years from the death of any such grantor, "settler or testator (*k*); that is to say, only after such "decease during the minority or respective minorities, "with allowance for the period of gestation of any per- "son or persons who, under the uses or trusts of the "deed, will or other assurance directing such accumula- "tion, would, for the time being if of full age, be entitled "unto the rents, issues, interests and profits so directed "to accumulate. And in every case where any accumu- "lation shall be directed otherwise than as aforesaid, "such direction shall be null and void, in so far as it shall

"exceed the limits of this act; (*l*) And the rents, issues, "interests and profits so directed to be accumulated con- "trary to the provisions of this Act, shall go to and be "received by such person or persons as would have been "entitled thereto if such accumulation had not been di- "rected."

XVIII.

We submit to the Court:

1st. It seems certain that wherever this trust property may go when the time comes, that the time is now at hand when the Court should take this property into its control.

Is it not apparent that the trustee has been faithless to his trust? And if the Court comes to this knowledge in any way, is it not within its power, *of its own motion*, to take notice of the breach of trust.

XIX.

THE DECREE OF THE COURT BELOW.

That decree is as follows (Record, page 197):

"And now, this thirteenth day of February, 1899, "upon consideration, it is ordered, adjudged and decreed "that the plaintiff's bill be dismissed; and it is further "ordered, adjudged and decreed that the plaintiffs pay "the costs, including the master's fees to be fixed *sec.* "*reg., and which, together with his compensation as exam-* "*iner shall be paid to the master in the first instance by* "*the defendants.*"

The Record discloses (page 2) that on March 4, 1899, the master as master and examiner was allowed $3,000.

And that on March 15, 1899, that sum was paid to him by John S. Duss, trustee, of the Harmony Society.

The learned judge of the Circuit Court says:

"The bill alleges conspiracy, fraud and immorality, "and these grave charges have not been withdrawn. "Having successfully vindicated themselves from these "charges the defendants are justly entitled to full costs." (Record, page 196.)

1st. Appellant made proof, and was sustained by the master, of existing immoralities among members of the society. By the master's report (page .)

As to the charges of fraud, the master has found as a fact that Mr. Hice and Mr. Reeves, two of the co-defendants in this cause, were partners and officers in the Economy Savings Institution, and that John S. Duss applied the trust funds in his hands to the payment of the entire liability of that bank, to the relief of Hice and Reeves from payment of any part or any share of their own liability, amounting to some $300,000 or $400,000; the said Savings Institution being an individual liability bank. And the evidence discloses that no effort was previously made, nor has at any time since been made by John S. Duss to compel such contribution. In addition the evidence also discloses that Mr. Hice was and had been for many years attorney and counsellor of the Harmony Society.

2nd. The appellants made an effort to show the general bad conduct of John S. Duss, and were met upon exception to that line of proof, by a decision of Judge Acheson, of the Circuit Court (Record, page 191), which says, *inter alia,*

"But with the alleged breaches of trust by Duss, as "trustee of the Harmony Society, or with his alleged "personal misconduct, the plaintiffs have no concern "unless they really have a proprietory title. It would, "therefore, be premature, and might be a sheer waste of "time to take testimony in relation to those matters un- "til the plaintiffs have made out a *prima facie* case of "ownership. * * * In the meantime his examination should "be confined within the limit alone indicated."

2nd. The appellants confined themselves to acts done by Duss and permitted by him to be done by other members, to show a *departure from the purposes, principles and doctrines of the society.*

Every charge we made against Duss was supported by testimony produced by appellants. The consideration of that testimony occupies many pages of the Master's Report. He, for one reason or another, fails to give effect to our evidence and chose to give weight to the testimony of Duss.

But *these charges and the testimony were made and introduced in good faith.* That the testimony ought to have convinced the master, we have no doubt, to-day. Except for circumstances as respects those very findings against us we would be here in this appeal on assignments of error as respects those findings.

The most heinous charge against Duss was sustained by an eye witness, and by other evidence quite convincing. That eye witness within three or four days recanted his testimony, and thereupon counsel for appellants, cause him to be indicted for perjury for his recantaion. When called for trial he plead *nolle contendre,* and stated to the Court that his recantation was perjured, and that his original testimony was true.

An offer of the record to prove his plea and confession was refused.

The fact, however, that testimony *was* introduced proving and tending to sustain the charges made should be and we submit is ample evidence of plaintiff's good faith, and should have protected the appellants against the penalty of the costs.

XX.

Whether the appellants have made out their title to proprietary

rights, it cannot, we think, be doubted they had good reason for their faith.

What were the plaintiffs to do in the circumstances? If they are right, had they not good reason to believe that all the trust estates would be dissipated and scattered? What decision or rule at law had previously settled the tenure of the estates in controversy?

It will be now for the first time decided, whether the appellants have reversionary rights, or whether the estates go to the last surviving member. Vast estates depend upon the result. Titles to those lands are dependent upon this decision.

In any aspect the appellants are not merely entitled to be relieved of the costs, but the expenses they have been compelled to incur should, we submit, be imposed upon the estates of the trust.

IN CONCLUSION:

It is further respectfully represented that the trust property of the society is in the possession of an irresponsible corporation dealing in real estate, which has it in its power to dispose of it all to third persons ignorant of any trust; that its title was acquired for a grossly inadequate and fraudulent undervaluation, and was paid for by its entire capital stock of $400,000; and that petitioners are unprotected by any interlocutory decree to preserve its status quo.

Therefore, in conclusion we most earnestly and respectfully represent that if the present decree is permitted to stand, Mr. Duss, the Senior Trustee, is:

(1) Openly invited to close the door to new members and to purchase the retirement of all the seven remaining members (under deeds of liquidation similar to the ones that were signed by the members retiring since the year 1893), so that he and his wife will alone remain in possession of this great estate and answerable to no one for its use or disposition.

(2) If it were lawful for the remaining members of the society to convey all the trust property to the Union Company, it will be lawful in the future:

(a) Either to sell certificates of stock in the Union Company for cash and depart with the proceeds;

(b) Or convert said assets to other private or capitalistic enterprises independent of their character or relation to the trusts under which said property was admittedly held.

It finally follows, therefore, that while the Circuit Court held it was unnecessary to pass upon and determine the final disposition of the property in case of dissolution, that we, as reversioners, must stand idly by and witness the practical and effective private sequestration of the trust estate until nothing remains to revert, because this covert method of disintegration will put the entire trust estate into the hands of the present surviving members without let or hindrance. To leave this cause in such a position seems improvident, and affords the present complainants no means whatever of protecting their rights in the premises.

Reversioners, just as in the case of remaindermen, have rights that a chancellor alone can adequately protect. The present decree invites the waste or entire dissipation of the trust estate, besides imposing heavy costs on the complainants in their efforts to conserve the estate of their ancestors. As the next of kin and as reversioners under a resulting trust, the complainants occupy a position entitling them to the protection of a Court of Equity, instead of leaving the whole estate in the hands of one whom the evidence shows to be wholly irresponsible, and, judged by his acts, intent upon the absorption of the assets of the society by himself and his colleagues, through methods so certain, if continued, that this "joint and indivisible stock" will become the private fortune of a man who never contributed a dollar or an acre of land to the society; a result clearly and utterly at variance with the articles of association creating the trust. While it may be that the ancestors of the plaintiffs intended (whether this could be lawfully done or not) that all inheritable rights should be suspended during the *life*

of the society, it is equally clear that they never intended that one or more persons, who later were entrusted with the control and perpetuation of the society, should be rewarded with the whole trust estate by acts of dissolution brought about by the coveteousness and treachery of would-be surviving members, acting as private liquidators.

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